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FEDERAL PRACTICE AND PROCEDURE—COMMENT—TITLE VII CLASS ACTION CERTIFICATION IN THIRD CIRCUIT DISTRICT COURTS.

I. INTRODUCTION

Since the enactment of Title VII of the Civil Rights Act of 1964 (Title VII),[1] which prohibits employment discrimination,[2] class action suits filed pursuant thereto have become a viable method of attacking discriminatory hiring practices. A suit does not qualify as a class action, however, unless it meets the requirements of rule 23 of the Federal Rules of Civil Procedure (rule 23).[3] While the burden of proving that these requirements have been satisfied is upon the party seeking such certification,[4] mere repetition of the language of rule 23 will not meet that burden.[5]

In order to comply with rule 23, the mandatory requirements of subsection (a) must initially be satisfied.[6] This subsection requires a showing of numerosity, commonality, typicality, and adequacy of representation.[7] In addition, a plaintiff must demonstrate the applicability of rule 23(b)(1), rule 23(b)(2), or rule 23(b)(3) to his suit.[8] Rule 23(b)(1) holds certification ap-

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1. 42 U.S.C. § 2000e (1976).

2. *Id.* Title VII provides in part that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e 2(a)(1).

3. *See* Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974). For the pertinent text of rule 23(b), *see* note 8 *infra*.

4. Davis v. Romney, 490 F.2d 1360, 1366 (3d Cir. 1974); McFarland v. Upjohn Co., 76 F.R.D. 29, 31 (E.D. Pa. 1977).

5. Gillibeau v. City of Richmond, 417 F.2d 426, 432 (9th Cir. 1969).

6. Davis v. Romney, 490 F.2d 1360, 1366 (3d Cir. 1974).

7. FED. R. CIV. P. 23(a)(1)-(4). *See* notes 20-149 and accompanying text *infra*.

8. FED. R. CIV. P. 23(b)(1)-(3). Rule 23(b) provides in pertinent parts:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and in addition:
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> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
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> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
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> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
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> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
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> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

propriate to prevent separate actions which would bind class members not parties to the adjudication, impair their ability to protect their rights, or create inconsistent standards of conduct for the party opposing the class.[9] Rule 23(b)(2) permits certification in a situation in which a party opposing the class has acted or has refused to act on grounds generally applicable to the class, thereby making injunctive relief appropriate.[10] Rule 23(b)(3) allows maintenance of a class action when the questions of law or fact common to the class predominate over those affecting its individual members.[11]

Actions under rule 23(b)(1) require no notice to class members, and the judgment binds all such members.[12] Notice to potential class members is required in rule 23(b)(3) actions, however, and an opportunity for class members to exclude themselves from the class is provided.[13] Rule 23(b)(3) effectively binds those persons who receive notice of the class action and are not otherwise excluded.[14]

The maintenance of an action as a class action is a discretionary decision which rests primarily with the federal district courts.[15] Because a federal appellate court may only review such certification decisions with respect to abuse of discretion,[16] the determinations of the district courts receive sub-

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(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id.

9. FED. R. CIV. P. 23(b)(1). For the text of rule 23(b)(1), *see* note 8 *supra*.

10. FED. R. CIV. P. 23(b)(2). For the text of rule 23(b)(2), *see* note 8 *supra*. The text of rule 23(b)(2) describes conduct of the defendant which may give rise to equitable relief. FED. R. CIV. P. 23(b)(2). While rule 23(b)(2) contemplates actions for final injunctions or declaratory judgments, application of the rule operates in suits for other types of equitable remedies. If subsequent action by a defendant eliminates the need for final injunctive relief, the class action suit may nevertheless continue under rule 23(b)(2). *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 251 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). Furthermore, some courts have supported Title VII class action suits formulated under rule 23(b)(2) in which both injunctive and monetary relief have been granted. *See, e.g.*, Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1375 (5th Cir. 1974); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719-20 (7th Cir. 1969).

11. FED. R. CIV. P. 23(b)(3). For the text of rule 23(b)(3), *see* note 8 *supra*.

12. *See* FED. R. CIV. P. 23(c)(3). Rule 23(c)(3) provides in pertinent part that "[t]he judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class." *Id.* Rule 23(c)(4) facilitates this procedure by allowing the court to divide the class into subclasses or maintain the class action with respect to certain issues. FED. R. CIV. P. 23(c)(4).

13. *See* FED. R. CIV. P. 23(c).

14. *See id.* Rule 23(c)(2) requires the "best notice practicable under the circumstances" to be given in a rule 23(b)(3) action. FED. R. CIV. P. 23(c)(2). The notice shall advise each member of his option to exclude himself from the class. *Id.* Rule 23(c)(3) provides that any class member given notice under rule 23(c)(2) who fails to opt out of the class shall be bound by any judgment. FED. R. CIV. P. 23(c)(3).

15. Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974).

16. Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). In *Wetzel*, the Third Circuit stated:

[The scope of review] will depend to some extent upon which fact of the multi-faceted determination is challenged on appeal. The district court must determine if the four pre-

stantial deference.[17] Consequently, the decisions concerning class action certification vary. This comment will focus upon class action certification decisions, and will attempt to inform the practitioner of the varying perspectives adopted by district court judges within the Third Circuit to resolve the issue of class action certification through an examination of their treatment of the requirements of rule 23 in the context of Title VII actions.[18] For purposes of this comment, it shall be assumed that the action is properly before a district court judge within the Third Circuit.[19]

II. APPLICATION OF RULE 23 TO TITLE VII ACTIONS

A. *The Requirements of rule 23(a)*

1. *Numerosity*

Rule 23(a)(1) provides that "one or more members of a class may sue as representative parties on behalf of all the class, only if the class is so numerous that joinder of all its members is impracticable."[20] Accordingly, the burden is upon the representative plaintiff to demonstrate that the class is large enough to warrant class action treatment and that joinder of all members is impracticable.[21] Despite this concept's apparent simplicity, it is a

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requisites for a class action listed in rule 23(a) have been met. These are mandatory requirements, and our review decides whether the mandates have been met. The district court must also determine whether the class action is maintainable under rule 23(b)(1) or (2) so that it may proceed without notice to or identification of the class members. Our review will determine whether the court properly classified the type of class action in reaching its decision as to class action treatment.

508 F.2d at 245, *quoting* Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974). Similarly, the scope of review of certification decisions was summarized by Professor Moore as follows:

> In determining whether an action brought as a class action is to be so maintained the trial court should carefully apply the criteria, set forth in Rule 23. . . , to the facts in the case; and if it fails to do so its determination is subject to reversal by the appellate court when the issue is properly before the latter court. On the other hand, where the trial court does apply the Rule's criteria to the facts of the case, the trial court has broad discretion in determining whether the action may be maintained as a class action and its determination should be given great respect by a reviewing court.

3B MOORE'S FEDERAL PRACTICE § 23.50, at 436-37 (2d ed. 1978). This summary has been quoted with approval by the Third Circuit in *Wetzel* and *Katz*. *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d at 245 n.6; Katz v. Carte Blanche Corp., 496 F.2d at 757.

17. *See* note 16 *supra*.

18. For an excellent discussion of class action requirements, *see* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). *See also* Note, *Federal Appellate Review of the Grant or Denial of Class Action Status*, 18 B.C. INDUS. & COM. L. REV. 101 (1976); Note, *Class Actions in the Seventh Circuit: Appealability of An Interlocutory Order Denying Class Status*, 53 CHI.-KENT L. REV. 462 (1976); Note, *Appealability of Class Action Determinations*, 44 FORDHAM L. REV. 548 (1975). For a discussion concerning Title VII class action suits on a more general level, *see* Janofsky, *Class Actions Under Title VII*, 27 LAB. L.J. 323 (1976).

19. Title VII established the Equal Employment Opportunity Commission to enforce Title VII by preventing unlawful employment discrimination. 42 U.S.C. § 2000e-4 & 2000e-5 (1976). The procedures by which a claim of discrimination reaches the district court are set out in Title VII. *See id.* § 2000e-5(c) to (g).

20. FED. R. CIV. P. 23(a)(1).

21. Moore v. Western Pa. Water Co., 73 F.R.D. 450, 452 (W.D. Pa. 1977).

requirement which has raised numerous problems and has generated divergent solutions within the Third Circuit.

The representative plaintiff need not establish class size with precision if he provides information from which the number of class members can be approximated.[22] In Title VII actions involving past and present employees, a representative plaintiff often experiences little difficulty in meeting this requirement because the defendant—employer's records are generally available, and the defendant–employer is not permitted to argue that its records are not discoverable for purposes of determining class action status.[23] The problem of numerosity becomes more complicated, however, when future applicants or future employees are involved in the potential class action. In such a case, the use of statistical evidence is permissible to estimate class size as long as there is a "logical nexus between that evidence and the issue of class size."[24] In relying on such evidence, a representative plaintiff may establish, without numeric precision, a class including future victims which meets the requirement of rule 23(a)(1).[25]

An example of the latter situation can be found in *Scott v. University of Delaware*,[26] where Judge Stapleton granted conditional certification[27] to a class represented by a black sociology professor who was the sole black professor terminated by the University.[28] The court stated that as long as class

22. Walker v. Robbins Hose Fire Co., 76 F.R.D. 218, 222 (D. Del. 1977), *citing* Moreno v. University of Md., 420 F. Supp. 541, 564 (D. Md. 1976).

23. Groves v. Insurance Co. of N. America, 433 F. Supp. 877, 881-82 (E.D. Pa. 1977). In *Groves*, plaintiff sought to represent a class of all Negroes currently employed by defendant in the Philadelphia area, all Negroes who had been employed by defendant in that area between July 2, 1965 and the date of the suit but were no longer employed, and all Negroes who unsuccessfully sought employment with defendant between July 2, 1965 and the present date. *Id.* at 881. The proposed class consisted of approximately 200 members. *Id.* Defendant contended that the number was wholly speculative, while plaintiff argued that he could not provide a more precise figure until discovery had been completed. *Id.* A contrary rule would necessarily place the employer in a position in which he could automatically defeat class action status. *Id.* In effect, defendant argued that his records were not discoverable because the action should not proceed as a class suit. *Id.* If this circular argument had been accepted, a plaintiff would never be permitted to examine employment records because, without them, a plaintiff would fail to satisfy the numerosity requirement. *Id.*

24. Walker v. Robbins Hose Fire Co., 76 F.R.D. 218, 222-23 (D. Del. 1977).

25. *Id.* at 222. "Future victims" refers to those future employees and future applicants who will be subjected to the alleged discriminatory practices. *Id.*

26. 68 F.R.D. 606 (D. Del. 1975).

27. Any district court may grant class action certification on a conditional basis under rule 23(c)(1), which provides: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." FED. R. CIV. P. 23 (c)(1). In an unpublished opinion filed September 14, 1976, the *Scott* court denied a motion for decertification, stating, that "even if specific enumeration were possible, the number of past, present and future victims of the discrimination would be of sufficient size to make that joinder impracticable." Walker v. Robbins Hose Fire Co., 76 F.R.D. 218, 221-22 (D. Del. 1977), *quoting* Scott v. University of Del., No. 77-58 (D. Del., filed Sept. 14, 1976).

28. 68 F.R.D. at 607-09. Defendant contended that since Professor Scott was the only black professor to have his employment terminated, he would be the sole member of the class of blacks alleging discrimination with respect to termination and, therefore, the numerosity requirement would not have been met. *Id.* at 608.

members were victims of the same policies,[29] the representative plaintiff need not have been discriminated against in the same manner.[30] The *Scott* court thus permitted a class consisting of past, present, and future employees and applicants, which proved to be of sufficient size to satisfy the numerosity requirement.[31] Accordingly, Professor Scott was permitted to represent those blacks discriminated against in hiring and recruitment although he had not been discriminated against in that manner.[32]

Subsequently, some district judges concerned with the broad language of the *Scott* decision adopted a more restrictive position concerning the use of future victims to create a class that would comply with rule 23(a)(1). In *Walker v. Robbins Hose Fire Co.*,[33] Chief Judge Latchum held that each case must be decided on its particular facts,[34] and rejected the notion adopted by *Scott* that a class which includes future victims of discrimination automatically satisfies the requirement of rule 23(a)(1) if that class cannot be specifically enumerated.[35] Furthermore, in *Martin v. Easton Publishing Co.*,[36] Judge Troutman held that the numerosity requirement had not been satisfied[37] because the grievance of the representative plaintiff was so individualized that no other person was similarly aggrieved.[38] By utilizing this narrow approach, Judge Troutman denied class certification in apparent contrast to the result in *Scott*.[39]

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29. *Id.* at 607-08. The complaint alleged that the unlawful practices were of a continuing nature and therefore plaintiff was seeking to represent future blacks as well as those already suffering from discrimination. *Id.* at 608.

30. *Id.* at 608. To support the claim for class certification, plaintiff produced a statistical comparison of the black faculty members at the university to the available pool of black professors with a Ph.D. *Id.* The *Scott* court, however, did not discuss the presentation of this evidence. *See* Walker v. Robbins Hose Fire Co., 76 F.R.D. 218, 223 (D. Del. 1977).

31. 68 F.R.D. at 608.

32. *Id.*

33. 76 F.R.D. 218 (D. Del. 1977).

34. *Id.* at 222.

35. *Id.* In *Walker*, plaintiff introduced evidence concerning only the number of blacks in the area. *Id.* The statistical evidence consisted of: 1) data indicating that approximately 7,000 blacks resided in the area; 2) employment records which showed that between 1961 and 1974, no blacks were employed by defendant; and 3) records which showed that, at the time of the suit, no blacks were employed by defendant company. *Id.* At the time of the decision, three black applicants had been accepted by defendant. *Id.* n.15.

Judge Latchum ruled that the nexus between the number of black residents and the number of blacks expected to apply to the company was too tenuous. *Id.* at 223. Accordingly, he considered the existence of a class to be mere speculation and held the evidence insufficient to satisfy the numerosity requirement. *Id.*

36. 73 F.R.D. 678 (E.D. Pa. 1977).

37. *Id.* at 683-84.

38. *Id.* at 683.

39. *Id.* at 683-84. *See* note 30 and accompanying text *supra*. The difference in these decisions may be reconciled by the fact that the *Martin* court found no *factual* allegations to support the broad conclusory allegations of discriminatory practices. 73 F.R.D. at 681. Specifically, plaintiff alleged facts which were peculiarly personal to her. *Id.* She related as an illustration a particular incident where she was given additional work, which resulted in an argument and termination of her employment. *Id.* at 679-80. Additionally, plaintiff failed to contradict defendant's affidavits establishing that no other female had ever been dismissed, that only one other female ever was transferred from part-time to full-time status within the family section of defendant organization, that no other woman ever was transferred from the family section to the

The use of future employees and applicants to fulfill the requirement of rule 23(a)(1) has also been questioned in other contexts with similar conflicts. For example, in *Williams v. Local No. 19, Sheet Metal Workers International Association*,[40] Judge Newcomer ruled that the proposed class was sufficiently large to make joinder impracticable and "sufficiently specific that the Court can, with reasonable ease, determine whether any given person falls within or without the class."[41] Likewise, Judge Huyett certified the class presented in *Webb v. Westinghouse Electric Corp.*,[42] which consisted of all black persons who had been employed by the defendant in a particular capacity and all black persons who had applied or will apply in the future for such employment.[43] Unlike the *Williams* decision, however, Judge Huyett did not specifically discuss the numerosity requirement of rule 23(a)(1).[44]

In contrast to the perspective developed in *Williams* and *Webb*, a less liberal interpretation of the numerosity requirement has been endorsed by Judge Teitelbaum.[45] In *Moore v. Western Pennsylvania Water Co.*,[46] Judge Teitelbaum rejected the inclusion of future black employees as members of the proposed class,[47] stating that those potential members "'comprised an amorphous, phantom group, incapable of identification' in terms of both individuals and numbers."[48] In refusing to certify the class, the district judge expressed fear that an overbroad framing of the class would be unfair to absent members and possibly deprive them of due process.[49] While the

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metro-news section, and that only 11 women ever held similar positions to that of plaintiff. *Id.* at 684. In McFarland v. Upjohn Co., 76 F.R.D. 29 (E.D. Pa. 1977), Judge Van Artsdalen took a similar approach, stating that "[p]laintiff has done no more than offer conclusory allegations unsupported by factual allegations." *Id.* at 32. In *McFarland*, plaintiff alleged that he was black, that he had been dismissed from employment immediately following an argument, and that he believed the motivation was racial. *Id.* at 31.

40. 59 F.R.D. 49 (E.D. Pa. 1973).

41. *Id.* at 53. The certified class included potential members of Local 19 that had sought admission to the local, or sought training in sheet metal work in preparation for admission to the local, or who had sought designation from Local 19 as journeymen sheet workers within the geographical jurisdiction of Local 19, or who had sought such employment within the geographical jurisdiction of Local 19. *Id.* at 52.

42. 78 F.R.D. 645 (E.D. Pa. 1978).

43. *Id.* at 648.

44. *Id.*

45. *See* Moore v. Western Pa. Water Co., 73 F.R.D. 450 (W.D. Pa. 1977).

46. 73 F.R.D. 450 (W.D. Pa. 1977).

47. *Id.* at 454. The two named plaintiffs contended that the seniority system, which required the first person laid off to be the last one hired prior to layoffs, had a disparate effect on blacks. *Id.* at 451. The initial hiring of blacks was allegedly a deceptive device to appease racial tension, placing the blacks in position for imminent layoff. *Id.* The proposed class also included five presently employed blacks and seven black employees already laid off but considered by the court as present employees, bringing the total class, exclusive of future employees, to 14. *Id.* at 452. The court held that 14 members did not make joinder impracticable. *Id., citing* Giordano v. Radio Corp. of America, 183 F.2d 558, 561 (3d Cir. 1950) (16 persons not sufficient to certify class); Mason v. Calgon Corp., 63 F.R.D. 98, 106-07 (W.D. Pa. 1974) (23 persons insufficient); McClinton v. Turbine Support, 68 F.R.D. 236, 238 (W.D. Tex. 1975) (29 persons not so many as to make joinder impracticable).

48. 73 F.R.D. at 453 (footnote omitted).

49. *Id.* The court further stated:

> In a true class suit the plaintiffs stand in judgment for the class and a judgment for or against the plaintiffs benefits or binds each member of the class personally under the

proposed class in *Moore*[50] was not as specific as the class presented to Judge Newcomer in *Williams*,[51] it was nevertheless as specific as the class which was certified by Judge Huyett in *Webb*.[52]

2. *Commonality*

Another prerequisite to the maintenance of a class action under rule 23 is the existence of "questions of law or fact common to the class."[53] In *Scott v. University of Delaware*,[54] Judge Stapleton suggested that for numerosity purposes, a party discriminated against may represent those who suffer discrimination in a different manner as long as they are victims of the same policy.[55] For this reason, *Scott* held that the class need not be limited to those persons who had sustained injuries identical to those allegedly inflicted by the defendant on the representative plaintiff.[56] This analysis has also been utilized in resolving the problem of commonality.

In *Karan v. Nabisco, Inc.*,[57] Judge Snyder held that although the claims need not be identical, substantial common questions which warrant a single suit must exist.[58] He noted that satisfaction of this burden would require a plaintiff to provide some reasonable basis beyond mere conjecture which both supports the allegation and presents some indication that the alleged injury was not an isolated incident but rather a policy of the defendant.[59] While this standard requires more than a mere allegation that defendant maintained a pervasive policy of discrimination which caused injury to the entire class,[60] *Karan* indicated that the representative plaintiff need not present a prima facie case showing the likelihood of success on the merits at this juncture of the proceedings.[61] Moreover, where plaintiff alleges discrimina-

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principles of res judicata. The members of the class must, therefore, be capable of definite identification as being either in or out of it.

Id., *citing* Giordano v. Radio Corp. of America, 183 F.2d 558, 561 (3d Cir. 1950).

50. 73 F.R.D. at 451. The proposed class was composed of black persons who were employed or might be employed by defendant at its Pittsburgh plant and those who have been, continue to be, or might be adversely affected by the discriminatory practices upon which the complaint was based. *Id.*

51. *See* note 41 *supra*.

52. *See* text accompanying note 43 *supra*.

53. FED. R. CIV. P. 23(a)(2). The requirement of commonality is closely related to that of typicality in rule 23(a)(3). A class action that fails to meet the requirements of commonality may also fail to meet the typicality requirements for the same reasons. This comment shall attempt to separate the two issues as clearly as possible, although much of the class action case law discusses the two issues simultaneously.

54. 68 F.R.D. 606 (D. Del. 1975).

55. *Id.* at 607-08. *See* notes 27-32 and accompanying text *supra*.

56. 68 F.R.D. at 607-08.

57. 78 F.R.D. 388 (W.D. Pa. 1978).

58. *Id.* at 403. The need for substantially common questions is mandated by the interests of judicial economy and convenience, which favor a single suit. *Id.* Moreover, a single suit is supported only where these common questions are not obscured by several unique factual and legal determinations. *Id.*

59. *Id.* at 404.

60. *Id.*

61. *Id.* at 403-04.

tion in several employment practices at a single facility, Judge Snyder found it reasonable to infer that all similarly situated employees at that facility would suffer from the same practices.[62] The same inference was considered permissible where a complaint involved a national, multifacility employer if specific terms of employment are uniformly applied to all employees.[63] Where the members of the proposed class work at various locations and the specific employment practices vary, however, plaintiff had the burden of providing evidence indicating that, while local practices differ, these practices form a consistent pattern throughout the system and are imposed by a central administration which has knowledge of the practices and yet permits them to continue.[64]

In *Hannigan v. Aydin Corp.*,[65] Chief Judge Lord reflected this position when he determined that the important question concerning commonality was whether the practice was applied individually or companywide.[66] In order to resolve this question, Chief Judge Lord suggested that district judges concentrate on four factors designed to limit the inquiry to the facts presented.[67] Specifically, these factors were: 1) the nature of the alleged practice; 2) the structure, size, and location of the company and its branches; 3) the diversity of the class membership; and 4) the centralization of management and personnel decisions.[68] In analyzing the issue of commonality, Chief Judge Lord stated that the complaint should be liberally construed and certification should be denied "only when it it clear that plaintiff could prove *no* set of facts which would establish that there was a company-wide policy of discrimination."[69] Chief Judge Lord had applied this

62. *Id.* at 404. Judge Snyder based this inference on the fact that discrimination is class based and employees at the facility work under nearly identical conditions. *Id.*

63. *Id.*

64. *Id.* The consistent pattern can be shown by statistical analysis or by evidence that workers at other plants have made similar allegations. *Id.* The court should decline to determine the legal sufficiency of any of the factors, but should simply satisfy itself that the allegation is not frivolous and that common questions will arise which will be addressed at the trial on the merits. *Id.* at 405.

The motion for class action certification in *Karan* was granted on a complaint that alleged that Nabisco pervasively practiced sex discrimination in its Pittsburgh plant, that the corporate headquarters knowingly permitted those practices to continue, that statistical evidence comparing women employees in skilled and unskilled positions suggested discrimination consistent with plaintiff's allegations concerning the Pittsburgh plant, and that this evidenced a companywide practice. *Id.* at 404. Plaintiffs also contended that a more specific breakdown of job categories after discovery would better reveal the questions in common to the class. *Id.*

65. 76 F.R.D. 502 (E.D. Pa. 1977).

66. *Id.* at 507.

67. *Id.* at 508. The court could not decide the issue of discrimination at this point because plaintiff had only presented facts sufficient to allege companywide discrimination. *Id.* at 508. *See also* text accompanying notes 60 & 61 *supra*.

68. 76 F.R.D. at 508.

69. *Id.* (emphasis added). Plaintiff alleged sex discrimination in compensation and promotional opportunities within the Vector Division of defendant corporation. *Id.* The proposed class included all past, present, and future female union and nonunion employees and applicants from November 8, 1972 to the time of the suit. *Id.* at 505. The complaint identified employees other than plaintiff who had suffered injuries similar to plaintiff's. *Id.* at 508. The court permitted the class to include nonunion employees, and held that the factual allegations were sufficient to include employees in the Vector Division outside of plaintiff's department. *Id.* at

liberal approach as early as 1971 to certify a class action in *Mack v. General Electric Co.*,[70] stating that because a "permeating policy of racial discrimination is alleged, there can be little doubt that there are questions of law and fact common to all class members and that the claims of the Negro plaintiffs that they have been discriminated against will be typical of the claims of other Negroes."[71]

A different problem concerning commonality arose in *Dickerson v. United States Steel Corp.*[72] In *Dickerson*, defendants contested the inclusion of present employees in a class represented by ex-employees on the ground that they shared no common question of law or fact.[73] While recognizing legitimate fears in this arrangement,[74] Judge Newcomer nevertheless granted certification because plaintiffs, who had requested relief which included reinstatement and promotions to the positions they would have acquired but for the discrimination, would be required to show present discrimination in order to prevail on the merits.[75]

While applying the same basic concepts, other courts have taken a stricter approach to satisfaction of the commonality requirement than have Chief Judge Lord and Judges Stapleton, Snyder, and Newcomer. In *Droughn v. FMC Corp.*,[76] Judge Huyett denied class certification to a proposed class of black female employees of defendant corporation within a specified time period[77] because the corporation was divided into departments within distinct groups that possessed autonomous and decentralized control of employment practices.[78] Moreover, Judge Huyett held that plaintiff had

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508-09. The court recognized that other courts had heard Title VII cases which had been too individualized, involving unusual employment decisions or a disciplinary measure affecting plaintiff. *Id.* at 508. *See, e.g.*, McFarland v. Upjohn Co., 76 F.R.D. 29, 31 (E.D. Pa. 1977) (plaintiff alleged only that he was black, that he was dismissed following an argument, and that he believed the motive was racial); Martin v. Easton Publishing Co., 73 F.R.D. 678, 680 (E.D. Pa. 1977) (plaintiff dismissed after an argument).

70. 329 F. Supp. 72 (E.D. Pa. 1971).

71. *Id.* at 76. *Mack* was cited with approval in Richerson v. Fargo, 61 F.R.D. 641 (E.D. Pa.), *vacated*, 64 F.R.D. 393 (E.D. Pa. 1974), where the court stated that "[w]hile it may be true that in an employment discrimination case there are certain facts which are unique to each individual claimant, the weight of authority has held that in such cases where a pattern of discrimination is alleged, the common questions of law and fact predominate." 61 F.R.D. at 642. In *Mack*, Chief Judge Lord accepted the invitation of the United States Court of Appeals for the Fifth Circuit to apply an "across the board" approach to class actions based on discrimination. 329 F. Supp. at 76. *See* text accompanying notes 155 & 156 *infra*.

72. 64 F.R.D. 351 (E.D. Pa. 1974).

73. *Id.* at 355-56.

74. In cases dismissing ex-employees as representative plaintiffs, judges were concerned with a lack of personal stake in the outcome by one not seeking reinstatement, or a lack of personal knowledge on the part of the plaintiff, which is instrumental in proving discrimination. *Id.*

75. *Id.* at 356.

76. 74 F.R.D. 639 (E.D. Pa. 1977).

77. *Id.* at 640-41. The time period was between September 12, 1966 and February 22, 1973 for employees, and after February 22, 1973 for applicants. *Id.*

78. *Id.* at 641. The defendant corporation consisted of three groups, the Corporate Group, the Machinery Group, and the Chemical Group. *Id.* The representative plaintiff was employed in the Management Information Service Department within the Chemical Group. *Id.* The Chemical Group employed 15,000 persons in 69 locations. *Id.*

failed to identify any particular companywide employment practice.[79] While plaintiff contended that the alleged practices were symptomatic of a pervasive policy of discrimination,[80] the major obstacles to achieving commonality were the lack of evidence indicating any policy mandated by the national headquarters and plaintiff's inability to prove that the group in which she was employed had control over the employment policy within its own division.[81] Accordingly, because all decisions were made at the department level, Judge Huyett concluded that the plaintiff could not represent any members of another group or any members of other departments within her own group.[82]

Similarly, Judge Troutman adopted a strict approach with respect to the satisfaction of rule 23(a)(2). In *Martin v. Easton Publishing Co.*,[83] plaintiff was dismissed from her employment after an argument following a change in her work schedule.[84] Plaintiff sought class action certification, contending that her dismissal was predicated on sex discrimination,[85] and that other female employees had been subject to similar action.[86] Judge Troutman concluded that the complaint provided no factual allegation applicable to the class as a whole[87] and thus rejected her request for certification as being purely conclusory.[88]

3. *Typicality*

Rule 23(a)(3) requires that "the claims or defenses of the representative parties . . . [be] typical of the claims or defenses of the class."[89] In deter-

79. *Id.* at 642. Instead, the court felt that plaintiff had relied on the principle that "across the board" class actions challenges were favored under Title VII. *Id.* For a discussion of the "across the board" approach, *see* notes 150-63 and accompanying text *infra*.

80. 74 F.R.D. at 642.

81. *Id.*

82. *Id.* at 642-43. Judge Huyett held that plaintiffs could not represent employees of other departments within the same group. *Id.* Under similar circumstances, however, Chief Judge Lord granted certification to a class consisting of employees from other departments within the Vector Division of the Aydin Corporation. Hannigan v. Aydin Corp., 76 F.R.D. 502, 509 (E.D. Pa. 1977). *See* note 69 *supra*. Similarly, Judge Snyder merely required the allegation of a pattern of discrimination sufficiently common to warrant further discovery and that the corporate headquarters must have at least known of and permitted these practices to exist. Karan v. Nabisco, Inc., 78 F.R.D. 388, 404-05 (W.D. Pa. 1978). *See* notes 57-61 and accompanying text *supra*.

83. 73 F.R.D. 678 (E.D. Pa. 1977).

84. *Id.* at 679-80.

85. *Id.* at 680. Plaintiff contended that she was subject to more difficult schedules than her male peers, unfair public reprimands, higher standards of subordination, and discriminatory practices relating to compensation, job assignment, and promotion. *Id.*

86. *Id.* at 681.

87. *Id.* In Martinez v. Bethlehem Steel Corp., 73 F.R.D. 125 (E.D. Pa. 1978), plaintiff similarly attempted to apply a broad class action approach to individual circumstances and was similarly denied certification. *Id.* at 128. The *Martinez* court held that plaintiff had failed to present any evidence of an identifiable policy but had only applied his "precise and specific circumstances peculiarly individual and personalized." *Id.* at 127-28.

88. 73 F.R.D. at 680. Other than the allegations of the circumstances of her dismissal, plaintiff factually alleged only that her male successor was hired at a substantially higher salary with regular salary review. *Id.*

89. FED. R. CIV. P. 23(a)(3).

mining whether the alleged class satisfies this requirement, many courts have adopted an analysis similar to that utilized in resolving the question of commonality.[90] In *Karan v. Nabisco, Inc.*,[91] Judge Snyder indicated that the purpose of the typicality requirement was to eliminate unique representatives.[92] Employing the same analysis as that used for resolving the issue of commonality,[93] the district judge found the typicality requirement satisfied by a class representing female employees and applicants at eleven Nabisco bakeries.[94]

In *Hannigan v. Aydin Corp.*,[95] Chief Judge Lord approached the requirement of typicality with the same liberal attitude that he had employed with respect to commonality.[96] He deemed three factors to be relevant in establishing a nexus between the claims of the plaintiff and those of the rest of the class: 1) similarity of conditions of employment; 2) similarity of alleged discrimination; and 3) compatibility of the relief requested by the plaintiff with that appropriate for the class.[97] Recognizing that no clear standard exists to determine when the representative plaintiff's claim becomes sufficiently analogous to that of the rest of the class to constitute typicality, Chief Judge Lord suggested that the nexus test be applied liberally so as to grant certification wherever plaintiff's allegations demonstrate that class members are subject to similar employment situations or that the class members' alleged injuries resulted from the practice *sub judice*.[98]

In *Williams v. Local No. 19, Sheet Metal Workers International Association*,[99] plaintiff was a nonwhite ex-member of Local 19 seeking to represent nonwhite members, former members, and potential members.[100] Defendant challenged the typicality of claims between ex-members and potential

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90. *See, e.g.*, Karan v. Nabisco, Inc., 78 F.R.D. 388, 405 (W.D. Pa. 1978); Droughn v. FMC Corp., 74 F.R.D. 639, 642-43 (E.D. Pa. 1977); Scott v. University of Del., 68 F.R.D. 606, 608 (D. Del. 1975); Dickerson v. U.S. Steel Corp., 64 F.R.D. 351, 355 (E.D. Pa. 1974); Richerson v. Fargo, 61 F.R.D. 641, 642-43 (E.D. Pa.), *vacated*, 64 F.R.D. 393 (E.D. Pa. 1974); Mack v. General Elec. Co., 329 F. Supp. 72, 74 (E.D. Pa. 1971).

91. 78 F.R.D. 388 (W.D. Pa. 1978).

92. *Id.* at 405, *citing* 7 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 1764, at 614 (1971).

93. *See* notes 57-64 and accompanying text *supra*.

94. 78 F.R.D. at 403.

95. 76 F.R.D. 502 (E.D. Pa. 1977).

96. *See* notes 65-69 and accompanying text *supra*.

97. 76 F.R.D. at 508. These factors bear some similarity to the criteria developed by Chief Judge Lord to resolve the question of commonality. *See* text accompanying notes 67 & 68 *supra*.

98. 76 F.R.D. at 508. Plaintiff established this nexus by making identical claims on her behalf and on behalf of the class, and by identifying other employees suffering similar disadvantages. *Id.* In addition, plaintiff established a nexus between union and nonunion employees by establishing that: 1) the discrimination charge arose from a denial of an opportunity for promotion to a position potentially available to union and nonunion employees, thus requiring study of discrimination as to both types of employees; 2) technical jobs held by nonunion employees were essentially "male jobs," while nonunion women held only clerical jobs; and 3) defendant controlled placement of employees. *Id.* at 509. The court thus concluded that all employees within the Vector Division of Aydin Corporation were permissible class members. *Id.*

99. 59 F.R.D. 49 (E.D. Pa. 1973).

100. *Id.* at 52. *See* note 41 and accompanying text *supra*.

members on the ground that ex-members may have a self-interest in excluding nonmembers, thereby increasing their own power with the union as token nonwhites.[101] Following the test endorsed by Chief Judge Lord in *Mack v. General Electric Co.*,[102] which permitted representation on the basis of an alleged general policy of racial discrimination,[103] Judge Newcomer stated that a court should not deny class action certification merely on the "bare possibility that a civil rights plaintiff might cynically not be in fact concerned with litigating fully the alleged broad policy of discrimination which he has challenged in his complaint."[104] In so doing, Judge Newcomer espoused a policy that it is in the best interests of both the potential class and the defendant to finally resolve the issue and thereby avoid continuous litigation from those denied class status.[105] Similarly, Judge Ditter suggested in *Groves v. Insurance Co. of North America*[106] that persons may assert any particular employment practice as part of a law suit designed to challenge all forms of discrimination against the class.[107]

While these policies and factors have been generally adopted, not all courts have applied them as liberally. As indicated above,[108] Judge Troutman denied class action status in *Martin v. Easton Publishing Co.*[109] because he considered the allegations to be unique and personal to the plaintiff, thereby failing to satisfy commonality and typicality requirements.[110] Subsequently, in *Hauck v. Xerox Corp.*,[111] Judge Troutman again denied class action certification to a plaintiff who admittedly had supplied more factual information concerning discriminatory practices than had the plaintiff in *Martin*.[112] Judge Troutman maintained that the plaintiff failed to satisfy the

101. 59 F.R.D. at 53.

102. 329 F. Supp. 72 (E.D. Pa. 1971).

103. *See* notes 70 & 71 and accompanying text *supra*. *See also* text accompanying notes 155 & 156 *infra*. In *Mack*, Chief Judge Lord stated that "[t]he broad Congressional purpose expressed in the civil rights acts, of eliminating job bias can well be effectuated by allowing any Negro claiming that an employer has discriminated against him on racial grounds to sue to end all that employer's racial discrimination." 329 F. Supp. at 76.

104. 59 F.R.D. at 53. For a discussion of "across the board" discrimination, *see* notes 150-63 and accompanying text *infra*.

105. 59 F.R.D. at 54. In deciding to grant certification, Judge Newcomer expressed apprehension as to the effects of excluding certain persons from the class. *Id.* Specifically, if the excluded person had a valid claim, a second suit would be required in order to provide relief. *Id.* In addition, if the court found no discriminatory practices, the court would be powerless to bind excluded claimants, thus subjecting defendant to continual litigation. *Id.*

106. 433 F. Supp. 877 (E.D. Pa. 1977).

107. *Id.* at 882-83. Defendant contended that the plaintiff, who had been hired, promoted, and transferred, voluntarily resigned, and thus was not typical of the class he sought to represent. *Id.* at 882. Plaintiff, seeking to represent blacks employed, terminated, and rejected by defendant in the Philadelphia area, contended that defendant discriminated racially in hiring, training, and promotion as part of a broad pattern of discrimination. *Id.* at 880-81.

108. *See* notes 36-39 & 83-88 and accompanying text *supra*.

109. 73 F.R.D. 678 (E.D. Pa. 1977).

110. *Id.* at 684. For a discussion of "across the board" discrimination, *see* notes 150-63 and accompanying text *infra*.

111. 78 F.R.D. 375 (E.D. Pa. 1978).

112. *Id.* at 378. Plaintiff alleged that her male supervisors refused her proper assistance, denied her deserved promotions so that male employees could be promoted, misled her as to responsibilities attached to her desired positions to deter her efforts to seek promotion, did not

commonality and typicality requirements[113] because factual allegations asserted by the plaintiff presented facts, circumstances, and proofs substantially different than those for the rest of the class.[114] According to the *Hauck* court, permitting a potentially successful litigant to represent the entire class in such a situation would provide certain parties, who would otherwise fail, with a "free ride."[115] Conversely, if the class representative were unsuccessful, the otherwise successful parties would be precluded from bringing individual actions.[116]

A comparison of the decisions in *Martin* and *Hauck* indicates that Judge Troutman has advanced both a position denying representative status to a plaintiff who has provided too few facts to support her assertion and a position refusing certification for providing too many facts, which vary the proof required.[117] While these decisions are couched in terms of permitting maintenance of a class action where there is an identifiable policy or practice applicable to similarly situated people,[118] the application of that standard by Judge Troutman clearly has not resulted in class action certification where the plaintiff alleges some facts to show either similar employment situations or class injury attributable to a discriminatory practice.[119]

Judge Teitelbaum also denied class action status for failure to satisfy typicality requirements in *Fannie v. Chamberlain Manufacturing Corp.*[120] In *Fannie,* plaintiffs alleged a "historical and continuing pattern and practice of discrimination against female employees"[121] and a discriminatory seniority treatment, averring that when defendant terminated one of its divisions

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inform her of career opportunities, and altered records used for promotions. *Id.* at 376. Additionally, she charged that in order to retaliate for charging discrimination, the male supervisors had aided male employees in attempts to pirate her accounts, issued discriminatory performance appraisals, discriminately increased budget goals, offered her lower compensation and expense allowances than males in like work, assigned jobs discriminatorily, and prevented her from attending a conference for which she had been chosen. *Id.* She also alleged that like treatment extended to others. *Id.* at 378. For example, she charged that an interviewer who had denied her a sales position in Baltimore also harassed another female employee intensely. *Id.*

113. *Id.* at 379. The court stated that denying class action status did not mean that other women would not benefit by plaintiff's case. *Id.* A recovery would have a deterrent effect on future discrimination and would establish a beneficial precedent. *Id.* Compare this view with the attitude of Judge Newcomer. *See* note 105 and accompanying text *supra.*

114. 78 F.R.D. at 378-79.

115. *Id.* at 379.

116. *Id.*

117. *See* notes 85-88 & 112-16 and accompanying text *supra.*

118. 78 F.R.D. at 378.

119. *See* notes 91-107 and accompanying text *supra.*

120. 445 F. Supp. 65 (W.D. Pa. 1977).

121. *Id.* at 69. The complaint specifically alleged discrimination in the terms and conditions of employment, of job classifications, and of assignments, in the seniority system, in layoff and recall practices, in negotiation, administration, and enforcement of collective bargaining agreements, in harassment of females, and in retaliation against those females who filed complaints concerning discrimination. *Id.* at 69-70. Additionally, it was alleged that the collective bargaining agreement in effect provided sex based job classifications and compensation scales. *Id.* at 70. Moreover, male employees were permitted to work while their female counterparts were laid off even though the women were senior to the men. *Id.* For a discussion of rule 23(b)(2), *see* text accompanying notes 152 & 153 *infra.*

which employed predominantly women, its employees were transferred to a predominantly male division with a loss of seniority rights.[122] Plaintiffs also contended that the operative collective bargaining agreements effectively perpetuated the impact of past discrimination by locking women into divisions which were no longer operational.[123] Judge Teitelbaum considered the sole basis of the requested relief to be employer retaliation against those female employees who had filed complaints of discrimination, even though the alleged practices clearly were predicated upon more than retaliation.[124] Judge Teitelbaum nevertheless denied certification, reasoning that the typicality requirement had not been satisfied because differing claims existed between the representative plaintiffs who had refused transfers and other unnamed plaintiffs who had accepted transfers.[125] Although the complaint also alleged discriminatory practices occurring after the transfers to the new division,[126] the district court dismissed that allegation summarily, holding that "that which is perceived as discriminatory treatment *could* merely be a result of adherence to the new Siding Division Seniority List."[127] In so deciding, Judge Teitelbaum apparently did not apply the nexus test developed by Chief Judge Lord in *Hannigan* as liberally as the Chief Judge had contemplated.[128] Likewise, *Fannie* failed to reflect the attitude evident in *Williams*, where Judge Newcomer had determined it to be in the best interest of both parties to either find discrimination or give a "clean bill of health," and had thus permitted ex-members of a union to represent potential members.[129]

4. *Adequacy of Representation*

The final requirement of rule 23(a) is that the representative parties must "fairly and adequately protect the interests of the class."[130] In *East Texas Motor Freight System, Inc. v. Rodriguez*,[131] the United States Supreme Court rejected a class represented by a plaintiff who had sustained no injury,[132] thus interpreting this procedural mandate as requiring the representative to have suffered the "same injury as the class represented."[133] In *Dickerson v. United States Steel Corp.*,[134] Judge Newcomer applied this test to deny a rule 23(a) motion for decertification which contested the inclu-

122. 445 F. Supp. at 70.
123. *Id.* Plaintiffs also alleged discriminatory practices resulting after transfer to the Siding Division, including harassment, intimidation, retaliation, and discriminatory job disqualification practices. *Id.*
124. *Id.* at 72. Regarding the alleged discriminatory practices, *see* note 121 *supra*.
125. 445 F. Supp. at 70-72.
126. *See* note 123 *supra*.
127. 445 F. Supp. at 72 (emphasis added).
128. For Chief Judge Lord's nexus test, *see* text accompanying note 97 *supra*.
129. *See* text accompanying note 105 *supra*.
130. FED. R. CIV. P. 23(a)(4).
131. 431 U.S. 395 (1977).
132. *Id.* at 403-04.
133. *Id.* at 403.
134. 439 F. Supp. 55 (E.D. Pa. 1977).

sion of present employees in a class represented by ex-employees.[135] The *Dickerson* plaintiffs were pursuing claims for relief from injuries to the class and to themselves.[136] In doing so, Judge Newcomer interpreted *Rodriguez* as being primarily directed at the adequacy of the named representatives rather than at the similarity of claims.[137] Adopting this position, Judge Stapleton found a lack of adequate representation in *Jenkins v. General Motors Corp.*[138] There the plaintiff had not been employed by General Motors for over four years and did not seek reinstatement, yet desired to represent a class including present employees.[139]

Additionally, Judge Snyder noted in *Karan* that district courts must be aware of collusion and of ignoring issues, must assure competent presentation of the cases, and must determine whether the trial would be thorough and fair as a single suit in order to ensure adequacy of representation.[140] To facilitate these objectives, Judge Snyder pointed out that a district court should review the manageability of the case and the competence of counsel, and should determine whether any antagonism exists between the plaintiff and the class.[141] Moreover, the court may bifurcate the trial on liability and individual relief to further adequacy of representation.[142]

In ascertaining whether the requirement of adequacy of representation has been met by the named plaintiff, the ability of the plaintiff's attorney and the character of the plaintiff is also considered.[143] In *Allen v. Butz*,[144] Judge Green determined that this requirement had not been satisfied because the plaintiff had changed counsel several times, suggesting an unstable attorney-client relationship.[145] Moreover, in *Cobb v. Avon Products, Inc.*,[146] the court refused the named plaintiff's request to represent the class because she had been working for another company while employed by the

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135. *Id.* at 62. *See* notes 27 & 72-75 and accompanying text *supra*.

136. 439 F. Supp. at 61. The court stated that when the class is certified and the plaintiffs do not prove their own injuries, the class claims would have already been presented *in toto* and thus the class would not be affected as to its ability to bring a class action. *Id.* at 61-62.

137. *Id.* at 61.

138. 354 F. Supp. 1040 (D. Del. 1973).

139. *Id.* at 1042-43. The court found that such a plaintiff would have no interest in establishing discrimination because he had left General Motors. *Id.* at 1044. The class included blacks who were employed or might be employed at General Motors' Wilmington, Delaware, plant, and those who had been, continued to be, or might be adversely affected by the practices complained of. *Id.* at 1043.

140. Karan v. Nabisco, Inc., 78 F.R.D. 388, 406 (W.D. Pa. 1978). The requirement of adequacy of representation has assumed significant importance with the advent of stricter res judicata rules. *Id.* at 405. For a discussion of the binding effect of class action decisions, *see* notes 9-12 and accompanying text *supra*.

141. 78 F.R.D. at 406.

142. *Id.* Judge Troutman did not choose to utilize this method in *Martinez*, although it was arguably appropriate. *See* note 87 *supra*.

143. *See, e.g.*, Richerson v. Fargo, 61 F.R.D. 641, 643 (E.D. Pa.), *vacated*, 64 F.R.D. 393 (E.D. Pa. 1974); Williams v. Local No. 19, Sheet Metal Workers Int'l Ass'n, 59 F.R.D. 49, 55 (E.D. Pa. 1973).

144. 390 F. Supp. 836 (E.D. Pa. 1975).

145. *Id.* at 841.

146. 71 F.R.D. 652 (W.D. Pa. 1976).

defendant.[147] The *Cobb* court found that plaintiff lacked sufficient attentiveness to the needs of the class and held that such attentiveness was a requisite to adequate class representation.[148] In addition to character, Judge Teitelbaum has noted that financial status of the plaintiff is relevant, but not conclusive, in determining whether a plaintiff may adequately represent a class.[149]

B. *Requirements of rule 23(b) and the "Across the Board" Approach*

In addition to compliance with the requirements of rule 23(a), a plaintiff seeking class action status must also meet one of three requirements of rule 23(b): 1) in a situation where class action would be appropriate, separate actions would bind class members not parties to the action, or create inconsistent standards of conduct, rule 23(b)(1); 2) in a situation where the party opposing the class has acted or refused to act on grounds applicable to the class as a whole, rule 23(b)(2); or 3) in a situation where common questions of law or fact predominate over individual questions, rule 23(b)(3).[150] Because a Title VII action against discriminatory employment practices is necessarily a suit to end common class based discrimination, compliance with rule 23(b)(2) is usually sought by potential class action plaintiffs.[151] Appropriately, the drafters of rule 23 contemplated that suits against employment discrimination would be maintained under rule 23(b)(2).[152] Under this section, the conduct of the employer is normally alleged to be actionable "on grounds generally applicable to the class," and relief is sought "with respect to the class as a whole."[153]

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147. *Id.* at 654-55.

148. *Id.* at 655.

149. Rode v. Emery Air Freight Corp., 76 F.R.D. 229 (W.D. Pa. 1977). In *Emery*, the court stated:

> *Seeking to represent a large group of people as a class representative in a lawsuit is a very heavy responsibility. It should never be undertaken lightly, and the court should allow such representation only upon a firm foundation that the named plaintiffs are willing and financially able to shoulder that burden . . . . Inadequate financing threatens the procedural and substantive interests of all members of the class.*

Id. at 231, *quoting* Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427, 434 (W.D. Mo. 1973).

150. For the requirements of rule 23(b), *see* notes 8-14 and accompanying text *supra.*

151. Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 250 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975). For the text of rule 23(b)(2), *see* note 8 and accompanying text *supra.*

152. Advisory Committee's Note to Proposed Amendment to Rule 23, 39 F.R.D. 69, 102 (1966). Since actions which satisfy the requirements of rule 23(b)(2) usually comply with rule 23(b)(3) as well, the action should proceed under rule 23(b)(2) so that the class members will be bound by a thorough and conclusive adjudication. *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 252-53 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975). *See also* note 10 *supra.* Under rule 23(b)(3), members of the class can opt out, and thereby not be bound by the adjudication. 508 F.2d at 252. *See* note 14 *supra.*

153. Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 250 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975).

The United States Court of Appeals for the Fifth Circuit has been instrumental in the expansion of class action suits in the civil rights area, holding that "racial discrimination is by definition class discrimination."[154] In *Johnson v. Georgia Highway Express, Inc.*,[155] the Fifth Circuit established a broad "across the board" approach to Title VII class action suits by stating that "while it is true . . . that there are different factual questions with regard to different employees, it is also true that the 'Damoclean threat of a racially discriminatory policy hangs over the racial class [and] is a question of fact common to all members of the class.'"[156]

The Third Circuit has also adopted this "across the board" approach.[157] Chief Judge Lord reflected this attitude in his opinion in *Mack v. General Electric Co.*,[158] in which he recognized that some jurisdictions had refused to accept the Fifth Circuit's "across the board" concept, but continued:

> We do not so decline. While discrimination exists and has existed nationwide, because discrimination has been more overt in the states of the Fifth Circuit that court has become very experienced in and sensitive to the subtle problems of racial discrimination. Congress has taken great strides to legislate bias out of our economy. Given the tools that Congress has now provided, courts would be remiss if they were not used to the fullest extent.[159]

Furthermore, in *Martin v. Easton Publishing Co.*,[160] Judge Troutman stated:

> [T]he 'across the board' approach may properly be applied to situations where an aggrieved plaintiff was affected by an identifiable policy or practice obviously applicable to others in like status . . . or . . . where it was *admitted* that the policy or practice identified was applied to *all* employees and hence all members of the class.[161]

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154. Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968).

155. 417 F.2d 1122 (5th Cir. 1969).

156. *Id.* at 1124, *quoting* Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966).

157. *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). *See also* notes 158-63 and accompanying text *infra*.

158. 329 F. Supp. 72 (E.D. Pa. 1971).

159. *Id.* at 75-76. This approach has been reaffirmed as the law of the Third Circuit. *See* Paddison v. Fidelity Bank, 60 F.R.D. 695 (E.D. Pa. 1973). Furthermore, in Jones v. United Gas Improvement Corp., 68 F.R.D. 1 (E.D. Pa. 1975), the court stated:

> While there may be some factual differences in the situations of individual class members, it would unduly restrict the remedial purposes of this civil rights legislation to fragment or dissolve a class action because of such nuances, when racial discrimination has been broadly alleged and all class members are potential victims of that discrimination.

Id. at 21.

160. 73 F.R.D. 678 (E.D. Pa. 1977).

161. *Id.* at 683 (emphasis by the court). The court found the *Wetzel* court's use of the words "homogeneous" and "cohesive" in its description of rule 23(b)(2) actions indicative of the fact that rule 23(b)(2) actions require that the interests of class members be so similar to those of the plaintiff that injustice wll not result from their being bound by the judgment through application of res judicata principles. *Id.* For the text and a discussion of rule 23(b)(2), *see* notes 8 & 10 and accompanying text *supra*. Judge Troutman denied class action status in *Martin* because

While the "across the board" approach satisfies the requirement of rule 23(b)(2), that approach is less significant where various employment conditions are at issue. In *Webb v. Westinghouse Electric Corp.*,[162] Judge Huyett noted that the approach adopted by Judge Troutman in *Martin* may limit the applicability of the "across the board" analysis where the conditions of employment for all employees vary according to the particular employee's trade, union, or situs of work.[163] Compliance with rule 23(b)(2) thus involves a consideration of homogeneous groups and claims similar to the issues involved in determining compliance with the requirements of rule 23(a).[164] Without this close relationship between the representative plaintiff and the potential class, the request for certification will be denied. Because this comment deals with class action certification in the context of Title VII suits, the requirements of rules 23(b)(1) and 23(b)(3), which are not generally applicable thereto, will not be discussed.[165]

III. CONCLUSION

While this survey did not concentrate upon the propriety of the decisions interpreting the requirements of rule 23 in the context of Title VII class actions, some pertinent observations may be made concerning the initiation of a Title VII class action suit in the district courts of the Third Circuit.

As a practical matter, when contemplating a class action suit under Title VII, the practitioner should ascertain whether the representative plaintiff is able to finance the lawsuit[166] and maintain a stable relationship with the attorney and class members.[167] Attorneys should also consider the standards announced in *Hannigan* by Chief Judge Lord in order to comply with the commonality and typicality requirements of rule 23(a).[168]

Furthermore, the allegation of discrimination in the complaint should be supported by facts sufficient to allege a policy of discrimination while avoiding specificity which would cast the suit in a personalized light.[169] Compliance with one of the requirements of rule 23(b) is attained most easily through rule 23(b)(2) because it was designed for this type of class action suit.[170] Most importantly, however, is the ability of the practitioner to understand fully the requirements imposed by the presiding judge. In light of

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plaintiff's claim was too particularized. 73 F.R.D. at 684. However, the principle outlined in *Martin* for use of the "across the board" concept has been utilized to certify class actions. *See* Webb v. Westinghouse Elec. Corp., 78 F.R.D. 645, 649-50 (E.D. Pa. 1978).

162. 78 F.R.D. 645 (E.D. Pa. 1978).

163. *Id.* at 649-50.

164. *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 256 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

165. *See* notes 9 & 11-14 and accompanying text *supra*.

166. *See* note 149 and accompanying text *supra*.

167. *See* text accompanying notes 144-48 *supra*.

168. *See* notes 65-69 & 95-98 and accompanying text *supra*.

169. *See* notes 109-19 and accompanying text *supra*.

170. *See* notes 151-53 and accompanying text *supra*.

the discretion conferred upon the district court judges in class action suits preparation in this area will permit an attorney to anticipate the requirements of a particular judge and to adequately comply with them.

Keith D. Heinold

FEDERAL PRACTICE AND PROCEDURE—COMMENT—POST-*Monell* VIABILITY OF IMPLIED FOURTEENTH AMENDMENT CAUSE OF ACTION AGAINST MUNICIPALITIES AND EXERCISE OF PENDENT JURISDICTION OVER STATE LAW TORT CLAIMS AGAINST MUNICIPALITIES IN THE THIRD CIRCUIT.

I. INTRODUCTION

Recently, in *Monell v. New York City Department of Social Services*,[1] the United States Supreme Court permitted a suit against a local governmental unit under section 1983,[2] thereby reversing its longstanding construction of the term "person"[3] in section 1983 as excluding local governments.[4] Prior to *Monell*, civil rights litigants often attempted to circumvent

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1. 436 U.S. 658 (1978).

2. 42 U.S.C. § 1983 (1976). This section of the United States Code codifies the Civil Rights Act of 1871, Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

The jurisdictional counterpart to § 1983 is § 1343(3) of the Judicial Code, 28 U.S.C. § 1343(3) (1976). Section 1343(3) provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Id.

3. 436 U.S. at 690. In *Monell*, the Supreme Court qualifiedly overruled Monroe v. Pape, 365 U.S. 167 (1961), insofar as *Monroe* held that local governments were not "persons" properly suable under § 1983. *Id.* In *Monroe*, the Supreme Court had viewed the legislative hearings for the proposed Sherman Amendment to the Civil Rights Act of 1871 as evidencing congressional intent to exclude municipalities from the definition of a "person" suable under § 1983. 365 U.S. at 188-92. On three subsequent occasions, the Supreme Court reaffirmed *Monroe*. *See* Aldinger v. Howard, 427 U.S. 1, 16-18 (1976); City of Kenosha v. Bruno, 412 U.S. 507, 512-13 (1973); Moor v. County of Alameda, 411 U.S. 693, 698–710 (1973). In *Monell*, however, the Supreme Court reevaluated its prior interpretations of congressional intent and concluded that a municipality may be sued under § 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . [for which] the government as an entity is responsible." 436 U.S. at 694. The *Monell* Court nonetheless affirmed *Monroe* insofar as it held that respondeat superior could not be a basis for rendering municipalities liable under § 1983 for the constitutional torts of their employees. *Id.* at 691.

4. 436 U.S. at 660. The plaintiffs in *Monell* were female employees of the Department of Social Services and the Board of Education of the City of New York. *Id.* These plaintiffs initiated a § 1983 action against the department and its commissioners, the board of education and its chancellor, and the city, challenging a policy requiring pregnant employees to take unpaid leaves of absence before such were necessary. *Id.* at 660-61. The United States Court of Appeals for the Second Circuit held that the Board of Education was not a "person" under § 1983, and hence was immune from a § 1983 award of damages. Monell v. Dept. of Social Servs. of the City of New York, 532 F.2d 259, 263 (2d Cir. 1976). Furthermore, the Second Circuit maintained that although the individual officials were "persons" properly suable under § 1983, it

this restriction[5] since direct municipal liability for the unconstitutional conduct of municipal agents afforded substantially higher recoveries than suits brought against the local officials individually.[6] For example, litigants at-

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would not allow a damage suit to proceed against these individuals in their official capacities because an award would "have to be paid by a City that was held not to be amenable to such an action in *Monroe v. Pape.*" *Id.* at 265. The United States Supreme Court granted certiorari to consider "[w]hether local governmental officials and/or local independent school boards are 'persons' within the meaning of 42 U.S.C. § 1983 when equitable relief in the nature of back pay is sought against them in their individual capacities." 436 U.S. at 662.

5. Litigants have attempted to evade *Monroe's* § 1983 proscription against suing municipalities by bringing municipal defendants into federal court through alternate methods. Some litigants have sought to hold municipalities liable under the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1976) (§ 1981). Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

Id. Although the Supreme Court has not ruled on whether municipalities are liable under § 1981, Ingraham v. Wright, 430 U.S. 651, 654 n.3 (1977), some federal courts, including the Third Circuit, have affirmatively allowed recovery against municipalities on this basis. *See, e.g.*, Hall v. Pennsylvania State Police, 570 F.2d 86, 91-92 (3d Cir. 1978); Mahone v. Waddle, 564 F.2d 1018, 1022-24 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978). For a discussion of *Mahone, see* notes 51-64 and accompanying text *infra*.

Other litigants have sought to invoke the fourteenth amendment to hold municipalities directly liable for the constitutional violations of their agents. *See* cases cited note 12 *infra*. These plaintiffs have argued that the federal court should imply a damage remedy against municipalities directly under the fourteenth amendment in the same way as the Supreme Court implied a damage remedy against federal agents for fourth amendment violations in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). *See* note 10 and accompanying text *infra*.

A third approach utilized to evade the limitations of § 1983 has been to acquire federal jurisdiction through the assertion of an implied fourteenth amendment claim, and thereafter seek to have the district court exercise its pendent jurisdiction over state law claims against a municipality. *See, e.g.*, Gagliardi v. Flint, 564 F.2d 112 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978); Kedra v. City of Philadelphia, 454 F. Supp. 652 (E.D. Pa. 1978). For a discussion of these three methods, *see*, Note, *From* Monroe *to* Monell: *Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP. L.Q. 409 (1978).

Certain attempts to circumvent the pre-*Monell* proscription against suing municipalities under § 1983 have been expressly rejected by the Supreme Court. *See, e.g.*, Aldinger v. Howard, 427 U.S. 1 (1976) (plaintiffs sought to append state law damage claims against a municipality to a § 1983 suit against individual officials); City of Kenosha v. Bruno, 412 U.S. 507 (1973) (plaintiffs contended that the § 1983 proscription barred only legal, not equitable, relief against municipalities); Moor v. County of Alameda, 411 U.S. 693 (1973) (plaintiff contended that when a state stripped a municipality of immunity by statute, there remained no bar to § 1983 damage actions). *See generally* Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 147 (1972).

6. Civil rights litigants confront at least four major difficulties in actions against public individuals. First, plaintiffs risk preclusion from recovery in some civil rights cases because it may be difficult to identify the individual officials responsible for the alleged constitutional violation. *See* Howell v. Cataldi, 464 F.2d 272, 279-84 (3d Cir. 1972) (affirming a directed verdict for two police officers alleged to have brutally beaten the plaintiff in a police station, on the ground that plaintiff had failed to prove whether the defendants were the policemen who actually administered the beating). Second, there is the risk that many officials lack the financial means to pay substantial judgments. *See* Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966) ("Neither the personal assets of the policemen nor the nominal bonds they furnish afford genuine hope for redress"). Third, plaintiffs risk that a jury may be reluctant to impose money damages on an official whom they perceive to be merely performing his official duties. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 421-22 (1971) (Burger, C.J., dissenting).

tempted to avoid the pre-*Monell* construction of section 1983 by asserting their claims against a municipality directly under the due process clause of the fourteenth amendment.[7] Subject matter jurisdiction in these cases was established through the pertinent federal question provision of section 1331(a) of the Judicial Code.[8] To substantiate these fourteenth amendment

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Finally, local officials, even when they have violated a plaintiff's constitutional rights, enjoy a good faith defense to a § 1983 action. *See* Wood v. Strickland, 420 U.S. 308 (1975) (to hold an individual liable under § 1983, proof must show the defendant's personal responsibility for the allegedly unconstitutional acts and their duty to know of or actual knowledge of constitutional requirements); Scheur v. Rhodes, 416 U.S. 232, 247-49 (1974) (immunity existed if the conduct was, in light of all the circumstances, reasonable and in good faith); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922 (1976). Where a municipality retains counsel, however, it may be proper to assume that the municipality acted with knowledge of existing constitutional limitations, and civil rights plaintiffs may therefore overcome the immunity defense when appropriate. *See* Hundt, *Suing Municipalities Directly under the Fourteenth Amendment*, 70 NW. U. L. REV. 770, 794 (1975).

7. *See, e.g.*, Turpin v. Mailet, 579 F.2d 152 (2d Cir.), *vacated sub nom.* West Haven v. Turpin, 47 U.S.L.W. 3368 (1978), *on remand*, (Second Circuit), (Jan. 30, 1979); Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975); Roane v. Callisburg Independent School Dist., 511 F.2d 633 (5th Cir. 1975); Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976).

See U.S. CONST. amend XIV, § 1. The fourteenth amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty or property without due process of law . . . ." *Id.* In order to establish a cause of action directly against a municipality for denial of due process, many plaintiffs have attempted to analogize the Supreme Court's decision in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), wherein the Court directly implied a damage remedy for illegal search and seizure under the fourth amendment. *See id.* at 395-96; notes 9 & 10 and accompanying text *infra*. While the Supreme Court has not conclusively decided that an implied fourteenth amendment claim exists for civil rights litigants, the position has received support from Justices Marshall and Brennan. *See* City of Kenosha v. Bruno, 412 U.S. 507, 516 (1973) (Brennan, J., concurring).

8. *See, e.g.*, Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Sixth Camden Corp. v. Evesham Township, 420 F. Supp. 709 (D.N.J. 1976); Dahl v. City of Palo Alto, 372 F. Supp. 647 (N.D. Cal. 1974). *Cf.* Smetanka v. Borough of Ambridge, 378 F. Supp. 1366, 1378 (W. D. Pa. 1974) (in passing § 1331, Congress did not intend that federal courts should judicially infer the simultaneous creation of a cause of action for money damages against a municipality when Congress itself had specifically considered and refused to legislatively create such liability in passing § 1343(3) and § 1983).

See 28 U.S.C. § 1331(a) (1976). Specifically, § 1331(a) of the Judicial Code provides in pertinent part: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." *Id.*

The Supreme Court has recognized that an implied fourteenth amendment cause of action for damages against a municipality "arises under" the Constitution, and therefore establishes federal subject matter jurisdiction under § 1331(a). Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 278-79 (1977); Aldinger v. Howard, 427 U.S. 1, 4 n.3 (1976); City of Kenosha v. Bruno, 412 U.S. 507, 514 (1973). It is important to note, however, that the question concerning the viability of a fourteenth amendment claim is distinct from the Court's conclusion that assertion of the constitutional cause of action provides a district court with subject matter jurisdiction. Significantly, the Supreme Court has acknowledged that, while a federal court may exercise subject matter jurisdiction over the matter, the claim may not be one upon which relief may be granted. *See* Bell v. Hood, 327 U.S. 678, 681-82 (1946). Specifically, the *Bell* Court explained:

> Before deciding that there is no jurisdiction, the District Court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States . . . . [W]here the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the

claims, these plaintiffs often have attempted to analogize their claims to those in *Bivens v. Six Unknown Named Agents*,[9] wherein the Supreme Court recognized an implied cause of action against federal officers for fourth amendment violations despite the absence of a statutory remedy.[10] Since

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> federal court . . . must entertain the suit . . . . The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.
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> . . . [T]he failure to state a proper cause of action calls for a judgment on the merits and not a dismissal for want of jurisdiction.

Id. Moreover, the Supreme Court has stated that the primary restriction upon the exercise of jurisdiction by a federal court is the requirement that the claim be substantial. *See* Hagans v. Lavine, 415 U.S. 528, 536-38 (1974). With regard to fourteenth amendment allegations, the Supreme Court has recognized the substantiality of that cause of action. *See* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. at 279.

9. 403 U.S. 388 (1971).

10. *Id.* at 397. The *Bivens* Court held that federal courts may award damages against federal agents for violating the fourth amendment proscription of unreasonable searches and seizures. *Id.* Construing this result broadly, *Bivens* became the first Supreme Court decision to definitively recognize that denial of a constitutional right may give rise to a cause of action for damages, even in the absence of a statute which authorizes such legal action. *See* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1542 (1972). Some authorities, however, have narrowly viewed *Bivens* as providing only a remedy for victims of unconstitutional federal action which is not covered by section 1983 since that statute applies solely to state action. *See* Note, *supra* note 6, at 932.

Underlying the entire discussion concerning the extension of *Bivens* to suits against municipalities is the basic question of whether federal courts have the power to create a damage remedy for violations of a constitutional right. 403 U.S. at 401-02 (Harlan, J., concurring). *See* Dellinger, *supra*, at 1540-43; Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969); Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969). In his majority opinion, Justice Brennan concluded that damages were an appropriate remedy for breach of fourth amendment rights because damages were "[h]istorically . . . the ordinary remedy for an invasion of personal interests in liberty." 403 U.S. at 395. Justice Brennan was persuaded that the power of the Court to imply a damage remedy was particularly strong because there existed "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396. Furthermore, the majority rejected the idea that congressional failure to provide a statutory cause of action reflected a federal fiscal policy against an award of damages for fourth amendment violations by federal officers. *Id.* Justice Brennan concluded that a damage action was the normal "remedial mechanism available in federal court" and that, in the absence of an explicit congressional declaration, a damage remedy should be permitted. *Id.* at 396-97.

In his concurrence, however, Justice Harlan emphasized that the Court had repeatedly implied private damage remedies for violations of federal statutes if such remedies were appropriate to effectuate the purposes of the statute. *Id.* at 402 n.4 (Harlan, J., concurring). He also argued that the inherent power of a federal court to grant equitable relief based upon the Constitution necessarily implied a similar power to grant a traditional remedy at law. *Id.* at 404-05 (Harlan, J., concurring). *See also* Hill, *The Law Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1025 (1967).

Moreover, Justice Harlan stated that the power of the judiciary to imply a damage remedy based directly on the Constitution depended on "whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted." 403 U.S. at 407 (Harlan, J., concurring). For a discussion of the "necessary or appropriate" standard, *see* Hundt, *supra* note 6, at 770; Dellinger, *supra* note 10, at 1543-52.

In contrast, the dissenting Justices in *Bivens* felt that the Court was engaged in "an exercise of legislative power that the Constitution does not give us." 403 U.S. at 428 (Black, J., dissenting). The rationale of the majority in *Bivens*, however, has been extended by the federal courts to imply a damage remedy against federal agents for constitutional violations other than the fourth amendment. *See, e.g.*, Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975) (court extended rationale of *Bivens* to provide a remedy for violation of the first amendment); United

the Supreme Court has expressly reserved decision on the merits of extending *Bivens* to suits against local governmental units,[11] however, the propriety of recognizing this direct constitutional remedy has been sharply debated in the lower federal courts.[12] Another method of redress has been to establish federal jurisdiction through such a constitutional claim and then obtain federal adjudication of state law tort claims against the municipality through pendent jurisdiction.[13]

This comment will discuss the approach taken by the United States Court of Appeals for the Third Circuit to the implied fourteenth amendment remedy,[14] and, in light of *Monell*'s holding that municipalities are "persons" suable under section 1983, will analyze the continued vitality of the Third Circuit's pendent jurisdiction approach.[15]

II. PRE-*Monell* MUNICIPAL LIABILITY

A. *Implied Fourteenth Amendment Approach*

Prior to *Monell*, the district courts in the Third Circuit debated the extension of the *Bivens* rationale to enable civil rights plaintiffs to sue local governments.[16] This debate stemmed in part from divergent philosophies

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States *ex rel.* Moore v. Koelzer, 457 F.2d 892 (3d Cir. 1972) (*Bivens* analysis adopted to allow damage recovery for fifth amendment violation).

11. Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 279 (1977).

12. Generally, some federal courts have been reluctant to extend the rationale of *Bivens* beyond the federal level to impose liability upon municipalities because such extension would conflict with established principles of federalism. *See, e.g.*, Jones v. McElroy, 429 F. Supp. 848, 860 (E.D. Pa. 1977); Perzanowski v. Salvio, 369 F. Supp. 223, 230-31 (D. Conn. 1974). In addition, some courts have held that the recognition of a damage remedy against municipalities for violations of the fourteenth amendment would countermand the Supreme Court's interpretation of § 1983. *See* notes 16 & 92 and accompanying text *infra*. *See generally* Comment, *Municipal Liability for Constitutional Violations: Can You Fight City Hall? A Survey of the Circuits*, 16 DUQ. L. REV. 373 (1978).

13. *See, e.g.*, Patzig v. O'Neil, 577 F.2d 841 (3d Cir. 1978); Pitrone v. Mercadante, 572 F.2d 98 (3d Cir.) (per curiam), *cert. denied*, 99 S.Ct. 99 (1978); Mahone v. Waddle, 564 F.2d 1018 (3d Cir.), *cert. denied*, 438 U.S. 904 (1978); Gagliardi v. Flint, 564 F.2d 112 (3d Cir.), *cert. denied*, 438 U.S. 904 (1978). *See* notes 36-83 and accompanying text *infra*. *Cf.* Aldinger v. Howard, 427 U.S. 1 (1976) (where no independent basis of federal jurisdiction over a municipality exists, a municipal party may not be joined as a pendent party in an action to adjudicate state law claims against that party arising out of the same facts as the federal claim against individual defendants).

14. *See* notes 16-35 and accompanying text *infra*.

15. *See* notes 84-105 and accompanying text *infra*.

16. In the United States District Court for the Eastern District of Pennsylvania, at least nine decisions have declared that a cause of action against a municipality exists under the fourteenth amendment. *See* Culp v. Devlin, 437 F. Supp. 20 (E.D. Pa. 1977); Santiago v. City of Philadelphia, 435 F. Supp. 136 (E.D. Pa. 1977); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977); Pinto v. Clark, 407 F. Supp. 1206 (E.D. Pa. 1976); Santore v. City of Philadelphia, No. 76-904 (E.D. Pa., filed Sept. 28, 1976); Harris v. City of Philadelphia, No. 75-3662 (E.D. Pa., filed Sept. 7, 1976); Rice v. City of Philadelphia, No. 73-893 (E.D. Pa., filed Jan. 22, 1976); Patterson v. City of Chester, 389 F. Supp. 1093 (E.D. Pa. 1975); Maybanks v. Ingraham, 378 F. Supp. 913 (E.D. Pa. 1974). However, at least five decisions in this district have held to the contrary. *See* Kedra v. City of Philadelphia, 454 F. Supp. 652 (E.D. Pa. 1978); Jones v. McElroy, 429 F. Supp. 848 (E.D. Pa. 1977); Crosley v. Davis, 426 F. Supp. 389 (E.D.

concerning the propriety of recognizing the fourteenth amendment remedy.[17] In addition, three early decisions by the Third Circuit suggested to some district court judges that the Third Circuit had at least impliedly, if not expressly, recognized a *Bivens* cause of action.[18]

In *Skehan v. Board of Trustees of Bloomsburg State College*,[19] the Third Circuit remanded the case for a factual determination[20] of the corpo-

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Pa. 1977); Pitrone v. Mercadante, 420 F. Supp. 1384 (E.D. Pa. 1976) *vacated and remanded*, 572 F.2d 98 (3d Cir.) (per curiam), *cert. denied*, 99 S. Ct. 99 (1978); Anderson v. Erwin, No. 76-2020 (E.D. Pa., filed Dec. 20, 1976).

17. *See, e.g.*, Crosley v. Davis, 426 F. Supp. 389 (E.D. Pa. 1977); Pitrone v. Mercadante, 420 F. Supp. 1384 (E.D. Pa. 1976), *vacated and remanded*, 572 F.2d 98 (3d Cir.) (per curiam), *cert. denied*, 99 S.Ct. 99 (1978). Some district courts which refused to imply a direct remedy against municipalities under the fourteenth amendment determined that such relief was not "necessary and appropriate." 426 F. Supp. at 395. Judge Becker explained:

> [B]y necessity we mean only that the implication of a particular remedy under a constitutional provision must further some identifiable purpose of that provision in some important respect. By appropriateness we mean that the decision whether to imply a particular remedy must also take into account other relevant circumstances including the undertakings of Congress in the area, the overall feasibility of evaluating the necessity of a proposed remedy from a judicial rather than a legislative standpoint, and any countervailing considerations.

Id. at 394. Applying these standards to the alleged fourteenth amendment claim, Judge Becker found the claim unnecessary because § 1983 provided adequate relief for civil rights litigants. *Id.* at 395. Moreover, the district judge concluded that such relief was inappropriate in light of congressional intent in promulgating § 1983. *Id.*

Other opponents of the implied fourteenth amendment cause of action have based their decisions on principles of federalism. *See* Jones v. McElroy, 429 F. Supp. 848 (E.D. Pa. 1977). In *Jones*, Judge Luongo noted that "federalism mandates caution in imposing new sources of liability against municipalities, particularly in light of the increasingly acute social and financial problems confronting them." *Id.* at 860.

On the other hand, some district courts recognized the validity of the fourteenth amendment claim by extending the theory of respondeat superior liability to municipalities. *See, e.g.*, Culp v. Devlin, 437 F. Supp. 20 (E.D. Pa. 1977); Santiago v. City of Philadelphia, 435 F. Supp. 136 (E.D. Pa. 1977). In *Culp*, Judge Newcomer noted that the City of Philadelphia, as an employer, should be liable for its employees because

> [i]f the employer is a proper party, then the ordinary common law principles of vicarious liability should be applied. Such liability provides a "deep pocket" from which a plaintiff can collect a judgment, and it imposes liability on an entity which hired the police officer and gave him the opportunity to commit a constitutional violation.

437 F. Supp. at 24 (citation omitted). Furthermore, in *Santiago*, Chief Judge Lord explained that this extension of liability to municipalities "is reasonable since the employer, rather than the injured party, is in a better position to absorb the costs, insure against them and distribute the costs to society." 435 F. Supp. at 148, *citing* W. PROSSER, THE LAW OF TORTS 459 (4th ed. 1971). For a discussion of respondeat superior liability of municipalities for the unconstitutional conduct of their agents, *see* Hundt, *supra* note 6, at 780-83; Note, 65 GEO. L. J. 1483, 1522 n.158 (1977); Note, 42 GEO. WASH. L. REV. 850 (1974).

18. *See* Rotolo v. Borough of Charleroi, 532 F.2d 920 (3d Cir. 1976); McCullough v. Redevelopment Authority, 522 F.2d 858 (3d Cir. 1975); Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974), *vacated and remanded on other grounds*, 421 U.S. 983 (1975).

19. 501 F.2d 31 (3d Cir. 1974), *vacated and remanded on other grounds*, 421 U.S. 983 (1975).

20. 501 F.2d at 45. Several factual determinations were called for, including the directive that the district court consider whether the defendant's actions were reprisals against the plaintiff for exercising his first amendment rights. *Id.* Specifically, Bloomsburg State College had decided to terminate the plaintiff's contract and discharge him during the 1970-1971 academic year. *Id.* at 34. In bringing this action, Skehan contended that the decision to terminate his contract constituted a denial of procedural due process. *Id.* at 36. Furthermore, the plaintiff alleged that the decision to terminate his contract, and his subsequent discharge, were moti-

rate status of Bloomsburg State College[21] after holding that, while the eleventh amendment would bar suit if the college were a state governmental unit,[22] the college could be sued under section 1331(a) if it had a separate corporate existence.[23] The *Skehan* court maintained that "the fact that the College is not a 'person' within the meaning of 42 U.S.C. § 1983 is not significant. . . . There is § 1331 jurisdiction to award relief against the college if under Pennsylvania law it is not an agency of the Commonwealth covered by the Commonwealth's immunity."[24]

Subsequently, in *McCullough v. Redevelopment Authority*[25] the Third Circuit affirmed the district court's denial on the merits of a fourteenth amendment equal protection challenge against the Redevelopment Authority of Wilkes-Barre.[26] Implicit in the *McCullough* court's ruling was the suggestion that the plaintiff had stated a claim upon which relief could be granted, but that he could not prevail on the merits since he had not sustained the burden of proving equal protection violations.[27]

Finally, in *Rotolo v. Borough of Charleroi*,[28] the district court dismissed a complaint asserting section 1983 claims against a municipal defendant.[29] On appeal, the Third Circuit vacated this dismissal and remanded

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vated by his exercise of his first amendment rights. *Id.* The Third Circuit concluded that the district court did not fully consider whether the plaintiff's discharge was at least partially based on activities protected by the first amendment. *Id.* at 39-40. The Third Circuit also remanded to the district court the issue of whether the plaintiff had an additional contractual right to a hearing prior to discharge under state law. *Id.* at 45.

21. *Id.* at 41.

22. *Id.* at 41-42. Specifically, the eleventh amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The eleventh amendment has been construed to bar suits by the citizens of one state against that state. Edelman v. Jordan, 415 U.S. 651, 662-63 (1974); Hans v. Louisiana, 134 U.S. 1, 10 (1890). Furthermore, the defense of sovereign immunity can only be waived by the express consent of the state. Edelman v. Jordan, 415 U.S. 651, 673 (1974).

In *Skehan*, the Third Circuit held that if the college were a state governmental entity, the defendant could assert the sovereign immunity protection of the eleventh amendment on appeal. 501 F.2d at 42.

23. 501 F.2d at 41. For the pertinent text of § 1331(a), *see* note 8 *supra*.

24. 501 F.2d at 44.

25. 522 F.2d 858 (3d Cir. 1975).

26. *Id.* at 880. In *McCullough*, plaintiffs were owners of flood damaged houses who alleged that they were entitled to have their residences acquired rather than rehabilitated by the Redevelopment Authority. *Id.* at 861. The court of appeals found that jurisdiction over the governmental agency was properly founded upon § 1331(a). *Id.* at 864. The plaintiffs alleged that the property acquisition criteria established by the Redevelopment Authority denied the plaintiffs equal protection since unequal burdens were placed on the plaintiffs to rehabilitate their flood damaged property while similarly damaged property was being acquired as part of the agency's urban renewal project. *Id.* at 873-74.

27. *Id.* at 880.

28. 532 F.2d 920 (3d Cir. 1976). The plaintiff in *Rotolo* was terminated from his employment as a building contractor for the defendant, a municipal corporation. *Id.* at 921. The plaintiff alleged that four borough councilmen voted to terminate his employment because he had exercised his first amendment rights. *Id.* Plaintiff instituted civil rights actions under § 1983 against the individual defendants and the Borough of Charleroi, seeking both monetary and injunctive relief. *Id.*

29. *Id.* at 921.

with instructions to permit the plaintiff "to amend the jurisdictional allegations in those parts of his complaints relating to the Borough of Charleroi" to allege jurisdiction under section 1331.[30]

In evaluating the precedential effect of *Skehan, McCullough,* and *Rotolo,* several district court judges have reached inconsistent results. While some district courts have held that this series of cases expressly recognized a *Bivens* cause of action in municipal discrimination liability claims,[31] other district judges have indicated that the Third Circuit only sustained federal subject matter jurisdiction therein and did not resolve the substantive issues.[32] This uncertainty was further reflected in subsequent opinions of the Third Circuit wherein individual appellate judges debated the holdings of *Skehan, McCullough,* and *Rotolo.*[33] The Third Circuit ended this debate in

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30. *Id.* at 922. The Third Circuit found that the lower court had properly applied *Monroe* to exclude the Borough of Charleroi from suit under § 1983. *Id.* The court noted, however, that plaintiff could have established jurisdiction over the municipality under § 1331(a) even though he made no mention of the federal question statute in his complaint. *Id.* The court therefore directed the lower court to afford plaintiff the opportunity to amend his complaint. *Id.* at 922–23.

31. *See, e.g.,* Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977); Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709 (D.N.J. 1976); Patterson v. City of Chester, 389 F. Supp. 1093 (E.D. Pa. 1975). In *Drennon,* Judge Higginbotham stated clearly the position of those advocating the extension of the *Bivens* rationale to municipal liability:

> In view of the allegation of the 14th Amendment violations . . . the plaintiff's claims obviously arise under the Constitution and laws of the United States. That violations of a person's constitutional rights can give rise to a cause of action for damages against a city and a municipal agency or instrumentality has been well established.

428 F. Supp. at 812 (citation omitted).

32. *See, e.g.,* Crosley v. Davis, 426 F. Supp. 389 (E.D. Pa. 1977); Pitrone v. Mercadante, 420 F. Supp. 1384 (E.D. Pa. 1976), *vacated and remanded,* 572 F.2d 98 (3d Cir.) (per curiam), *cert. denied,* 99 S.Ct. 99 (1978). Significantly, these district courts interpreted *Skehan* as narrowly holding that a nonfrivolous claim brought under the fourteenth amendment provided the federal court with subject matter jurisdiction. *See* Pitrone v. Mercadante, 420 F. Supp. at 1388 n.10. Furthermore, Judge Becker noted that

> *Skehan* did not represent a decision on the merits of the implication question, but was instead a decision that there was jurisdiction to assert such a claim . . . . Concomitantly, our decision proceeds under Fed. R. Civ. P. 12(b) (6), failure to state a claim upon which relief can be granted, and not under 12(b) (1). We do believe that there is jurisdiction to allege the Fourteenth Amendment claim.

Crosley v. Davis, 426 F. Supp. at 393 n.13 (citations omitted).

33. *See* Gagliardi v. Flint, 564 F.2d 112 (3d Cir. 1977), *cert. denied,* 438 U.S. 904 (1978). In *Gagliardi,* Judge Rosenn concluded that the Third Circuit had not recognized that a fourteenth amendment cause of action could be asserted against municipal corporations which are not persons within the meaning of § 1983. 564 F.2d at 115 n.3. Furthermore, Judge Rosenn noted that in *Skehan, Rotolo,* and *McCullough,* the only issue decided was "that federal question jurisdiction, as opposed to a federally recognized right to relief, is created by the mere allegation of matters in controversy, arising under the Constitution or laws of the United States." *Id., citing* Bell v. Hood, 327 U.S. 678 (1946).

While concurring in *Gagliardi,* Judge Gibbons strongly contended that *Skehan, Rotolo,* and *McCullough* had created a fourteenth amendment cause of action against municipal corporations for civil rights violations. 564 F.2d at 119 (Gibbons, J., concurring). Judge Gibbons explained that

> [i]f any of these cases were before us after an order dismissing them for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b) (1), they could be so read [to apply only to the jurisdictional issue]. But every one of them was a review of a dismissal on the merits, and in every one we reversed or affirmed on the merits.

Patzig v. O'Neil[34] by stating that

> this Circuit has not yet decided that issue. *Skehan* holds only that federal courts have *jurisdiction* under 28 U.S.C. § 1331 to hear constitutional claims against entities (such as municipalities) which are not persons for purposes of 42 U.S.C. § 1983. *Skehan* does not hold and is therefore *not* authority for the proposition that money damages may be recovered from such an entity on a cause of action implied directly under the fourteenth amendment. This issue of whether there exists a direct fourteenth amendment cause of action (as distinct from its jurisdictional predicate) against a municipality for tort damages has yet to be resolved in this Circuit, and has been expressly left open and reserved for future determination.[35]

B. *The Pendent Jurisdiction Approach*

After deciding *Skehan*, *McCullough*, and *Rotolo*, the Third Circuit sanctioned an approach whereby implied fourteenth amendment cases could be resolved on nonconstitutional grounds.[36] Initially, the court relied[37] on the Supreme Court's decision in *Mount Healthy City Board of Education v. Doyle*[38] as support for the proposition that where a nonfrivolous claim based directly on the fourteenth amendment is asserted against a municipality, federal subject matter jurisdiction exists under section 1331(a).[39] The Third Circuit then permitted a district court to exercise pendent jurisdiction to hear a plaintiff's state law claims against that municipality.[40]

Id. at 118 (Gibbons, J., concurring). After reviewing *Skehan*, *Rotolo*, and *McCullough* in detail, Judge Gibbons concluded that the Third Circuit had recognized the asserted fourteenth amendment claim. *Id.* at 119 (Gibbons, J., concurring).

34. 577 F.2d 841 (3d Cir. 1978).

35. *Id.* at 850 (citations omitted).

36. *See* notes 37-83 and accompanying text *infra*.

37. *See* Gagliardi v. Flint, 564 F.2d 112, 115 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978).

38. 429 U.S. 274 (1977).

39. *Id.* at 279. In *Mt. Healthy*, respondent Doyle sued for reinstatement in his former job with back pay, alleging that his dismissal constituted violations of his first and fourteenth amendment rights. *Id.* at 276. He asserted jurisdiction under both § 1343(3) and § 1331(a). *Id.* The district court assumed jurisdiction under § 1331(a) and awarded relief. *Id.* at 277. In response to objections raised by the school board, the Supreme Court held that subject matter jurisdiction existed under § 1331(a), and that an objection thereto asserting failure to state a claim upon which relief can be granted would not defeat the subject matter jurisdiction of the district court. *Id.* at 279.

40. *See* notes 41-83 and accompanying text *infra*. Pendent jurisdiction provides the authority to litigate in a federal forum claims arising under state law when coupled with a federal claim arising from a common nucleus of operative fact. *See* United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Note, 81 HARV. L. REV. 657 (1968). The utilization of the doctrine of pendent jurisdiction as a means to bring municipalities into federal court is also discussed in Note, *supra* note 5, at 435-41. *See also* note 5 *supra*.

Furthermore, it is generally maintained that a federal court should always decide the nonconstitutional claims before reaching the constitutional issues. *See* Hagans v. Lavine, 415 U.S. 528 (1974) (pendent claim involved a federal statute); Siler v. Louisville & Nashville R. R. 213 U.S. 175 (1909) (alternate claim involved state law). Specifically, the Supreme Court has held that "[g]iven a constitutional question over which the District Court had jurisdiction, it

This approach was first applied by the Third Circuit in *Gagliardi v. Flint*,[41] wherein the plaintiff sought to hold the City of Philadelphia liable for the fatal shooting of her son by city policemen.[42] Although the plaintiff had asserted a claim based upon the fourteenth amendment,[43] the federal district court found municipal liability under the Pennsylvania Wrongful Death Act[44] and thus avoided the constitutional issue.[45] Relying on the Supreme Court's decision in *Hagans v. Lavine*,[46] the Third Circuit held that the district court did not abuse its discretion in avoiding the fourteenth amendment claim.[47] Moreover, the *Gagliardi* court noted that it "may reverse the district court's determination to decide the pendent state law claims against the city only if the fourteenth amendment claim is so insubstantial that it cannot serve as the basis for federal question jurisdiction under the general federal question statute."[48] Applying the *Mt. Healthy* rationale to the present situation, the Third Circuit concluded that although a substantial argument against implying vicarious liability against municipalities under the fourteenth amendment could be made, "the question remains perplexing and substantial."[49]

Following *Gagliardi*, the Third Circuit endorsed a similar analysis in resolving a civil rights damages action against two police officers and the City of Pittsburgh.[50] In *Mahone v. Waddle*,[51] plaintiffs alleged that the city was vicariously liable for the conduct of its employees under the fourteenth

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also had jurisdiction over the 'statutory' claim . . . . The latter was to be decided first and the former not reached if the statutory claim was dispositive." Hagans v. Lavine, 415 U.S. at 543 (citations omitted).

41. 564 F.2d 112 (3d Cir. 1977), *cert. denied*, 438 U.S. 312 (1978).

42. 564 F.2d at 113-14. Plaintiff based her claim against the City of Philadelphia on a theory of respondeat superior. *Id.* at 114. The doctrine of respondeat superior is derived from tort law, and holds an employer liable for the acts of his agents committed within the scope of their employment. *See* W. PROSSER, *supra* note 17, §§ 69-70, at 458-67. When applied in the fourteenth amendment context of suing municipalities, the theory of respondeat superior is utilized to hold a municipality liable for the misconduct of its employees when that misconduct is in furtherance of the employer's purposes rather than purely private in nature. *Id.* Since deprivations of civil rights are viewed as "constitutional torts," Pierson v. Ray, 386 U.S. 547, 556-57 (1967); Monroe v. Pape, 365 U.S. 167, 187 (1961); Picking v. Pennsylvania R.R., 151 F.2d 240, 249 (3d Cir. 1945), *cert. denied*, 332 U.S. 776 (1947), it is possible to borrow the doctrine of respondeat superior from tort law for utilization in constitutional adjudications. *See* Hundt, *supra* note 6, at 779; Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352 (1970); Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965).

For an excellent discussion of the policy reasons behind holding a municipality liable under the fourteenth amendment on the basis of respondeat superior, *see* Hundt, *supra* note 6.

43. 564 F.2d at 114.

44. *See* 12 PA. CONS. STAT. ANN. §§ 1601-1604 (Purdon 1953) (current version at 42 PA. CONS. STAT. ANN. § 8301 (Purdon 1978)).

45. 564 F.2d at 114.

46. 415 U.S. 528 (1974). *See* note 40 *supra*.

47. 564 F.2d at 116.

48. *Id.* at 114.

49. *Id.* at 116. .

50. *See* Mahone v. Waddle, 564 F.2d 1018 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978).

51. 564 F.2d 1018 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978).

amendment[52] and section 1981,[53] and that the city was directly liable for negligently and recklessly training the two individual defendants.[54] The United States District Court for the Western District of Pennsylvania found that the city was immune from liability under the fourteenth amendment and section 1981, and dismissed the complaint against the city.[55] On appeal, the Third Circuit affirmed the dismissal of the fourteenth amendment claim,[56] but stated that the district court may have subject matter jurisdiction to decide the pendent state law claims against the city.[57] Moreover, the *Mahone* court clarified the *Gagliardi* rationale by suggesting that the exercise of pendent subject matter jurisdiction may be inappropriate where the plaintiff's claim for relief under state law "is not co-extensive with the relief available under the fourteenth amendment."[58]

In a separate opinion, Judge Garth analyzed the fourteenth amendment issue on a different basis.[59] Relying on *Bivens*,[60] Judge Garth suggested that the Third Circuit expressly reject on its merits an implied cause of action against municipalities under the fourteenth amendment.[61] Judge Garth further argued that the Supreme Court's decision in *United Mine*

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52. 564 F.2d at 1021.

53. *Id.*

54. *Id.* Specifically, plaintiffs contended that the City of Pittsburgh was directly liable "for its alleged negligence or wanton recklessness in failing to train and supervise the two individual defendants and in permitting them to act as police officers notwithstanding the City's prior knowledge of their propensity to harass and mistreat black citizens." *Id.*

55. *Id.* The district court dismissed the federal claims against the city pursuant to rule 12(b)(6) of the Federal Rules of Civil Procedure, FED. R. CIV. P. 12(b)(6), for failure to state a claim upon which relief can be granted. 564 F.2d at 1021. In the absence of jurisdiction based upon federal law, the district court was unwilling to exercise its derivative, pendent jurisdiction over the state law claims, and consequently dismissed those claims as well. *Id.* The district court's rationale was that the municipal immunity available under § 1983 extended to claims brought under the fourteenth amendment and to those based upon § 1981. *Id.*.

56. 564 F.2d at 1037. Since the *Mahone* court granted relief under § 1981, it expressly declined to join the debate concerning the fourteenth amendment *Bivens* remedy. *Id.* at 1024. The court of appeals based its holding on the fact that "specific fourteenth amendment violations alleged in the instant case are racial in character and as such, are fully actionable under section 1981." *Id.* at 1025 n.8.

57. *Id.* at 1026.

58. *Id.* In a separate opinion, Judge Garth implied that the relief available under the state law claims in *Mahone* was not coextensive with the relief available under the federal claims when he stated that an adjudication of the claims would not be "dispositive," and therefore argued that the majority incorrectly applied Hagans v. Lavine, 415 U.S. 528 (1974). 564 F.2d at 1055 (Garth, J., concurring in part and dissenting in part). *See* notes 65 & 82 and accompanying text *infra*.

59. 564 F.2d at 1037 (Garth, J., concurring in part and dissenting in part).

60. For a discussion of *Bivens*, *see* notes 9 & 10 and accompanying text *supra*.

61. 564 F.2d at 1052 (Garth, J., concurring in part and dissenting in part). Specifically, Judge Garth suggested that if the court implied a fourteenth amendment cause of action for damages, it would be legislating. *Id.* at 1061 (Garth, J., concurring in part and dissenting in part). Other factors influencing Judge Garth's decision to not create a fourteenth amendment claim included the strength of congressional intent in enacting § 1983 as determined by the Supreme Court, the absence of congressional action to include municipalities under § 1983 after Monroe v. Pape, 365 U.S. 167 (1961), and the less than compelling need to have such a remedy in view of individual liability under §§ 1981 and 1983. 564 F.2d at 1059–61 (Garth, J., concurring in part and dissenting in part).

Workers v. Gibbs,[62] mandated that the pendent state claims be dismissed.[63] Quoting from *Gibbs*, Judge Garth observed that "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right . . . [and] . . . [i]f the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."[64]

In *Pitrone v. Mercadante*,[65] the Third Circuit substantiated the rationale of *Gagliardi* in approving the district court's discretionary consideration of the pendent state law claims while refusing to rule on the merits of the fourteenth amendment claim.[66] District Judge Ditter had ruled that a fourteenth amendment claim could not be implied,[67] and thus felt precluded by the Supreme Court's decision in *Aldinger v. Howard*[68] from exercising jurisdiction over the state law issues.[69] The Third Circuit, however, observed that the *Aldinger* Court held "only that a city may not be joined as a pendent party to an action when there is no independent source of federal jurisdiction over"[70] the party, whereas the fourteenth amendment issue in *Pitrone* created federal subject matter jurisdiction.[71] Pursuant to the holding in *Gagliardi*, the *Pitrone* court remanded and instructed the district court to exercise its discretion and hear the pendent state law claims.[72]

62. 383 U.S. 715 (1966). Specifically, the Court stated that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties by procuring for them a surer-footed reading of applicable law." *Id.* at 726.

63. 564 F.2d at 1061 (Garth, J., concurring in part and dissenting in part).

64. 564 F.2d at 1061 (Garth, J., concurring in part and dissenting in part), *quoting* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

65. 572 F.2d 98 (3d Cir.) (per curiam), *cert. denied*, 99 S. Ct. 99 (1978). Unlike the plaintiffs in *Mahone*, whose state law claims were grounded in negligence, the plaintiff in *Pitrone* asserted the township's liability for assault and battery by several police officers on the basis of respondeat superior. Pitrone v. Mercadante, 420 F. Supp. 1384, 1387 (E.D. Pa. 1976). The plaintiffs also asserted state law claims sounding in negligence for the failure of the township to establish and enforce guidelines for the use of deadly force by police officers. *Id.* In terms of Hagans v. Lavine, 415 U.S. 528 (1974), the determination of respondeat superior liability of the municipality for the assault and battery of plaintiff would thus be "dispositive" of the plaintiff's cause of action because the elements of proof and damages sought under state law would be coextensive with the relief available under the Constitution. *See* note 40 *supra*.

66. 572 F.2d at 100.

67. 420 F. Supp. at 1391.

68. 427 U.S. 1 (1976). In *Aldinger*, the plaintiff asserted a federal cause of action based on § 1983 against a county and certain individual defendants, alleging federal jurisdiction under § 1343(3). *Id.* at 3-4. The lower court rejected the § 1983 claim against the county based on prior Supreme Court decisions which had precluded suits against municipalities under § 1983. *Id.* at 5. Plaintiff argued alternately that the county could be joined as a pendent party on state law claims which arose from the same facts as those underlying the federal cause of action against the the individual defendants. *Id.* at 4-5. Because those federal claims against the individual defendants also rested on § 1983, the Supreme Court held that the congressional policy implicit in that statute to create municipal immunity prevented the exercise of pendent jurisdiction over the county since no independent basis of federal jurisdiction over the municipality existed. *Id.* at 17-19.

69. 420 F. Supp. at 1391.

70. 572 F.2d at 100, *quoting* Gagliardi v. Flint; 564 F.2d 112, 115 n.2, *cert. denied*, 438 U.S. 904 (1978).

71. 572 F.2d at 100. *See* note 68 *supra*.

72. In a concurring opinion, Judge Gibbons considered the exercise of pendent subject matter jurisdiction to be a reasonable accommodation between state and federal law. *Id.* at 102

The Third Circuit's most recent opportunity to discuss the implications of *Gagliardi* occurred in *Patzig v. O'Neil*,[73] in which the court acknowledged the propriety of extending federal jurisdiction to state law claims.[74] In *Patzig*, plaintiffs sought recovery from the City of Philadelphia, the Philadelphia Police Commissioner, and various police officers,[75] alleging that their misconduct resulted in the death of the plaintiffs' daughter.[76] The district court granted a directed verdict on all claims against plaintiffs.[77] While affirming this directed verdict in part[78] and refusing to consider the merits of an implied fourteenth amendment cause of action,[79] the Third Circuit nevertheless applied the *Gagliardi* rationale to consider the state claims.[80] The *Patzig* court stated:

> In this case *sub judice*, the district court, which correctly decided that the City was subject to its jurisdiction under § 1331, was faced with several state law claims against the City, as well as the constitutional claims. Under *Gagliardi* the court had the discretion to entertain those state claims. Yet the district court, as far as we can tell from the record, never addressed the pendent claims—*i.e.* it never exercised its discretion under *Gagliardi*. Accordingly, we must remand to the district court in order that it may consider the exercise of pendent jurisdiction with regard to the state law claims before deciding the federal constitutional issue.[81]

(Gibbons, J., concurring). To support this conclusion, Judge Gibbons noted that in both Pennsylvania and New Jersey, municipal corporations were liable under state law for the torts committed by their agents. *Id.* *See* Ayala v. Philadelphia Bd. of Educ., 453 Pa. 584, 305 A.2d 877 (1973); Jackson v. Hankinson, 51 N.J. 230, 238 A.2d 685 (1968). Moeover, Judge Gibbons noted that Delaware was approaching a similar result. 572 F.2d at 101 (Gibbons, J., concurring). *See* City of Wilmington v. Spencer, No. 77-221, slip op. at 6 (Del. Sup. Ct., filed July 25,, 1978); Pajewski v. Perry, 363 A.2d 429 (Del. 1976).

73. 577 F.2d 841 (3d Cir. 1978).

74. *Id.* at 850–51.

75. *Id.* at 845.

76. *Id.* at 845-46. Plaintiffs sued on behalf of their daughter, who hanged herself while in confinement after the arrest for drunken driving. *Id.* at 845. Plaintiffs contended that their daughter was arrested without probable cause in violation of her fourth amendment right against unreasonable search and seizure, that subsequent delay before their daughter appeared before a magistrate violated due process, and that the treatment their daughter received while in custody constituted cruel and unusual punishment. *Id.* at 845-46. In addition, plaintiffs asserted state law claims based on false arrest and negligence. *Id.* at 846.

77. *Id.* at 846.

78. *Id.* at 846–49. Specifically, the *Patzig* court found that the district court did not err in granting a directed verdict against plaintiffs on the issues of due process and cruel and unusual punishment. *Id.* at 846. With regard to the state law false arrest claim, however, the court of appeals reversed the directed verdict against the plaintiff because "the evidence, taken in the light most favorable to the plaintiffs, would sufficiently support the inference that Patzig did not appear intoxicated when arrested." *Id.* at 848–49.

79. *Id.* at 850.

80. *Id.* at 850-51.

81. *Id.* (footnote omitted).

Additionally, the *Patzig* court reaffirmed the position adopted in *Mahone* that a substantive decision concerning the fourteenth amendment issue may be necessary where the relief available under state law is not coextensive with the relief available under the fourteenth amendment.[82] In

82. *Id.* at 851 n.11. Specifically, the *Patzig* court noted:

> In both *Pitrone* and *Mahone* the relief available under state law was co-extensive with that sought under the fourteenth amendment. In this case as well the relief is co-extensive—both as to elements of proof and elements of damages—since the plaintiffs alleged a state law false arrest claim as well as a constitutional false arrest claim. (The elements of each are for the most part the same. Both would support punitive damages.)
>
> In *Mahone* we recognized that "a case may arise in which a plaintiff claims the relief available under state law is not co-extensive with the relief available under the fourteenth amendment." . . . This is not such a case either. Had the plaintiff not asserted the state false arrest claim, however, we would have been faced with a very different case, a case in which the relief sought under state law (negligence) would not have been co-extensive with the relief sought under the fourteenth amendment (unconstitutional arrest), either as to elements of proof or elements of damages. In such a situation we may well be required to reach the fourteenth amendment question. . . . We do not decide that question here, however.

Id. (citations omitted).

A case illustrative of a factual situation in which the Third Circuit might very well be required to reach the merits of the fourteenth amendment action is Hayes v. City of Wilmington, 451 F. Supp. 696 (D. Del. 1978). In *Hayes*, the plaintiff was a municipal fireman who was suspended without pay for allegedly violating three of the Bureau of Fire rules. *Id.* at 700. The suspension lasted approximately "four and one-half months, and ended immediately after a departmental board held a hearing on the three charges and found Hayes guilty of all of them." *Id.* "In accordance with the Trial Board's recommendation, Hayes received a sanction of one thousand hours of penalty time and five years of probation." *Id.* at 700. Hayes then asserted claims for damages and injunctive and declaratory relief against the City of Wilmington under the fourteenth amendment, claiming that the defendant effected his suspension in violation of his constitutional right to procedural due process, that one of the rules he violated was unconstitutionally vague and overbroad, and that the penalties imposed upon him violated his rights under federal and state law. *Id.* With respect to the claims against the city, Chief Judge Latchum noted that the recent approach sanctioned by the Third Circuit was to "reaffirm the long-standing preference for deciding cases on state law grounds and avoiding unnecessary issues of constitutional law, whenever possible." *Id.* at 704. The Chief Judge then noted that whether a fourteenth amendment issue could be avoided on the facts of *Hayes* depended "on whether the relief available under the pendent state law claims is co-extensive with that available under the Constitution." *Id.* After discussing this qualification as announced in *Mahone* and *Patzig*, Judge Latchum concluded:

> The instant case does present a situation in which the relief available under the state law claims is not co-extensive with the relief sought under the Fourteenth Amendment. The state law claims are based on an alleged breach of a collective bargaining agreement and an alleged violation of the Delaware Minimum Wage Law. The elements of proof on the federal and state claims differ significantly. The elements of damages also differ. For example, only the federal claims provide a remedy for the injury plaintiff allegedly sustained as a result of his four-and-one-half-month suspension without pay. Therefore, this Court must determine whether a direct cause of action exists under the Fourteenth Amendment.

Id. at 704-05.

Chief Judge Latchum then decided that the fourteenth amendment did not give rise to a cause of action for damages against the municipality, and granted summary judgment in favor of the city and the individual defendants in their official capacities on the fourteenth amendment damage claims. *Id.* at 705.

Patzig, however, such a determination was unnecessary since the remedies available under state law and the fourteenth amendment were considered coextensive.[83]

III. POST-*Monell* VIABILITY

In light of *Monell*'s holding that municipalities are now "persons" suable under section 1983,[84] two questions arise: 1) whether there is continued vitality to the fourteenth amendment cause of action against municipalities; and 2) whether the Third Circuit's pendent jurisdiction approach to circumventing the pre-*Monell* proscription against suing municipalities under section 1983 remains viable.

It is submitted that the *Monell* decision may have impliedly substantiated the viability of the fourteenth amendment issue since the only discussion in *Monell* of the fourteenth amendment cause of action occurred in Justice Powell's concurrence, in which he argued that such a claim could not be maintained against local governments.[85] The majority in *Monell* ruled only that governmental liability under section 1983 could not be based on the principle of respondeat superior[86] but must depend on "execution of a government's policy or custom, whether made by its lawmakers or by those

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83. 577 F.2d at 851 n.11.

84. *See* notes 1-4 and accompanying text *supra*. *But see* Turpin v. Mailet, 579 F.2d 152 (2d Cir.), *vacated sub nom.* West Haven v. Turpin, 47 U.S.L.W. 3368 (1978), *on remand*, (Second Circuit) (Jan. 30, 1979). In *Turpin*, the United States Court of Appeals for the Second Circuit held that a municipality could be sued under the fourteenth amendment. "This governmental culpability arises whenever the unconstitutional actions of employees are authorized, sanctioned, or ratified by municipal officials or bodies functioning at a policy making level." 579 F.2d at 168. The Second Circuit, however, expressly stated that respondeat superior liability under the fourteenth amendment could not be imposed upon the municipality. *Id.* The Supreme Court vacated the Second Circuit's opinion and directed that court to reconsider its opinion in light of *Monell*. 47 U.S.L.W. 3368 (Nov. 27, 1978). On remand, the Second Circuit held:

> While the Monell decision does not call into question the central thesis that federal courts have the power and the obligation under the general federal question jurisdiction to create remedies to redress constitutional grievances, an important element in this court's previous decision to imply a damages remedy under the Fourteenth Amendment was that Congress had not supplied a vehicle by which the right in question could be vindicated.
>
> Monell held that Section 1983 suits may be brought against municipalities under conditions essentially coextensive with those imposed by this court on the private right of action enunciated in the earlier opinion. Thus, under the very rationale of that previous opinion, there is no place for a cause of action against a municipality directly under the Fourteenth Amendment, because the plaintiff may proceed against the city under section 1983.

(Second Circuit) (January 30, 1979).

Despite the Supreme Court's vacation of the Second Circuit's recognition of an implied fourteenth amendment cause of action, it is submitted that this action was not a statement by the Court that a fourteenth amendment cause of action could not be implied. Rather, the Court suggested that under the facts of *Turpin* and the subsequent decision in *Monell*, a statutory ground for relief might be available. 47 U.S.L.W. 3368 (Nov. 27, 1978).

85. 436 U.S. at 712 (Powell, J., concurring).

86. *Id.* at 690-95.

whose edicts or acts may fairly be said to represent official policy."[87] Clearly many complaints filed in the Third Circuit alleging municipal liability could not comply with this requirement for establishing section 1983 liability against a local governmental unit.[88]

Since the pre-*Monell* municipal exemption from liability under section 1983 did not foreclose the implication of a cause of action under the fourteenth amendment,[89] it would be inconsistent to interpret *Monell* as prohibiting fourteenth amendment suits solely because section 1983 does not permit vicarious liability. Nevertheless, in light of the reasoning which supported the pre-*Monell* cause of action under the fourteenth amendment,[90] any debate concerning municipal vicarious liability will probably focus on the propriety of imposing respondeat superior liability on local governments.[91] Since *Monell* expressly held that a municipality cannot be liable on the basis of respondeat superior under section 1983, many federal courts may be reluctant to impose this liability under the fourteenth amendment.[92]

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87. *Id.* at 694.

88. *See* notes 41-42, 50-51 & 65 and accompanying text *supra*. In addition, the burden of proving an official custom may be rigorous. *See* Rizzo v. Goode, 423 U.S. 362 (1976) (Supreme Court established requirement of adoption, encouragement, or implementation of a deliberate policy to find an official custom concerning "police brutality").

89. *See* notes 17 & 31 and accompanying text *supra*.

90. *See* notes 6 & 12-17 and accompanying text *supra*.

91. *Id.* For a more thorough discussion of this point by another commentator, *see* Note, *supra* note 5. Further illustrative of this opinion is Chief Judge Lord's opinion in Santiago v. City of Philadelphia, 435 F. Supp. 136 (E.D. Pa. 1977). In *Santiago*, Chief Judge Lord stated that a cause of action under the fourteenth amendment on the basis or respondeat superior should be upheld even if such vicarious liability would not support a section 1983 action against a municipality:

> We also conclude that even if *respondeat superior* were held inapplicable in a § 1983 claim, such a holding would not dictate a similar conclusion in an action pursuant to the fourteenth amendment. . . . Section 1983 is a statutory right and its interpretation does not control the boundaries of a judicially created constitutional remedy.

Id. at 149 n.4. *See also* note 17 and accompanying text *supra*. Although *Santiago* was a pre-*Monell* decision, the policy arguments advanced favoring respondeat superior liability under the fourteenth amendment upon which Judge Lord relied are still viable support for the implication remedy. The Court in *Monell* recognized the justifications for respondeat superior but concluded that such could not be applied under § 1983, the statutory remedy, because of congressional intent to preclude such liability under the statute. 436 U.S. at 692–94.

The fact that Congress intended to preclude liability under § 1983 on the basis of respondeat superior does not *a fortiori* preclude the possibility of such liability under the Constitution. However, using Justice Harlan's "necessary or appropriate" standard as well as Justice Brennan's "special factors counselling hesitation," *See* 403 U.S. at 407 (Harlan, J., concurring), a strong argument can be made that Congress has preempted the fourteenth amendment area in terms of municipal liability for unconstitutional conduct, and that since plaintiffs have both state and federal claims against the individual violators of their constitutional rights, there is no need for a court to engage in a *Bivens* type of judicial legislation. *See* notes 10, 17 & 61 and accompanying text *supra*.

92. *See generally*, Note, *supra* note 5, at 438. *See also* Kedra v. City of Philadelphia, 454 F. Supp. 652 (E.D. Pa. 1978). In *Kedra*, plaintiffs alleged that they were illegally arrested and beaten by police officers as well as subjected to illegal searches. *Id.* at 658-59. They brought an action under § 1983 and the fourteenth amendment against the police officers, their superiors, and the City of Philadelphia for violations of their civil rights. *Id.* at 659–60. Judge Luongo, noting that *Monell* was decided after the parties had submitted their briefs, construed the issue before him in light of *Monell*:

Moreover, if a fourteenth amendment action on the basis of respondeat superior continues to be considered a substantial federal question after *Monell*,[93] then the pendent state claim approach of *Gagliardi, Mahone, Pitrone,* and *Patzig* should remain a viable alternative through which a substantive decision concerning the fourteenth amendment issue can be avoided.[94] While in each of those four cases plaintiffs alleged substantive constitutional claims against local governments, the Third Circuit avoided the merits of the fourteenth amendment claims by first resolving the pendent state law issues.[95] Since the Third Circuit was reluctant to decide the fourteenth amendment issue before *Monell*, it is submitted that the Third Circuit will be equally reluctant to decide this issue on the merits in light of *Monell*.

Finally, the *Monell* decision presents new problems for the pendent jurisdiction approach developed by the Third Circuit in *Gagliardi* and its progeny. In particular, *Monell* may effect the concern expressed by Judge

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> The question, then, is whether plaintiffs allegations against the City contain the "touchstone" identified by the Court: 'an allegation that official policy is responsible for a deprivation of rights.' A survey of the complaint discloses nothing approaching such an allegation. Rather, the complaint makes clear, and plaintiffs' brief confirms, that the only theory asserted against the City is *respondeat superior*, the theory specifically foreclosed by *Monell*. I therefore hold that plaintiffs may not maintain an action against the City of Philadelphia under the Civil Rights Act of 1871.

Id. at 677.

Furthermore, Judge Luongo emphatically rejected the validity of an implied fourteenth amendment cause of action against a municipal corporation. *Id.* at 677–79. In so doing, Judge Luongo adopted an approach similar to the analysis he utilized in Jones v. McElroy 429 F. Supp. 848 (E.D. Pa. 1977) in arriving at the same conclusion. *Id.* at 856-60. In addition, Judge Luongo refused to exercise his discretion to hear the pendent state claims presented by the plaintiffs against the City of Philadelphia. 454 F. Supp. at 682. In explaining his reasoning, Judge Luongo stated that

> the primary reason for rejection of the Fourteenth Amendment theory is that it circumvents the civil rights enforcement scheme established by Congress, which prohibits federal litigation of this type of *respondeat superior* claim against municipalities. Allowance of federal litigation of these state law claims against the City would have the same result; it would negate the Supreme Court's recent judgment that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort."

Id. at 683 (citations omitted).

93. *See* notes 7-9 and accompanying text *supra*.

94. *Cf.* Kedra v. City of Philadelphia, 454 F. Supp. 652, 682 (E.D. Pa. 1978) (a post-*Monell* complaint dismissed under § 1983 because pleadings failed to allege official municipal policy or custom was responsible for the deprivation of civil rights; the district court also refused to consider a fourteenth amendment claim against the city because to do so would circumvent congressional intent as interpreted in *Monell* to hold a municipality immune under § 1983 from respondeat superior liability; the district of court then refused to consider the state pendent claims because allowance of these claims would equally circumvent congressional intent by allowing a municipality to be sued on the basis of respondeat superior in federal court). *See* note 92 *supra*.

95. *See* Patzig v. O'Neil, 577 F.2d 841 (3d Cir. 1978); Pitrone v. Mercadante, 572 F.2d 98 (3d Cir.) (per curiam) *cert. denied*, 99 S. Ct. 99 (1978); Mahone v. Waddle, 564 F.2d 1018 (3d Cir.), *cert. denied*, 438 U.S. 312 (1978); Gagliardi v. Flint, 564 F.2d 112 (3d Cir.), *cert. denied*, 438 U.S. 312 (1978).

Garth that a federal court may never reach an implied fourteenth amendment issue when it has the option of deciding only the pendent state law claims:

> If such a claim were always joined with a related state law claim—*e.g.*, a state tort claim—the federal claim could be used again and again for the sole purpose of creating otherwise nonexistent federal jurisdiction. Under the majority's interpretation of *Hagans*, the validity of the federal claim might never be reached.[96]

This issue may never be resolved, however, in view of Judge Luongo's interpretation of *Monell* in *Kedra v. City of Philadelphia*,[97] wherein he noted that the exercise of pendent subject matter jurisdiction over state claims circumvents congressional intent in enacting section 1983 to grant municipalities immunity from suits based on theories of respondeat superior.[98] If this interpretation is adopted by other federal courts, the ability of litigants to use pendent subject matter jurisdiction to bring an action in federal court may be lost.

In addition, the *Monell* decision did not define the elements of governmental "custom" for purposes of establishing municipal liability under section 1983. The inability of the *Monell* Court to adequately define the requirement of governmental custom is reflected in the *Kedra* decision, in which Judge Luongo reviewed the plaintiffs' complaint and ruled that it could not support an action under section 1983.[99] If this ambiguity is not resolved, the utility of the *Monell* ruling may be substantially diminished since many plaintiffs may want to avoid the risk of an adverse judgment on the pleadings by failing to adequately allege a governmental custom.[100] Without an articulation by the Supreme Court as to the meaning of "custom," plaintiffs might rely on an implied fourteenth amendment claim against the municipality and seek federal subject matter jurisdiction over pendent state claims.

In the final analysis, the practical effect of *Monell* is to foster uncertainty. If a plaintiff asserts section 1983 liability by alleging that his injury was the result of a municipal custom or policy, he risks judgment on the pleadings as in *Kedra*.[101] If, in an attempt to avoid this, he seeks federal jurisdiction by asserting a fourteenth amendment claim, and then appends his state law claims thereto, he relies not only on the individual judge's determinations about the propriety of the fourteenth amendment remedy

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96. 564 F.2d at 1055 n.33.

97. 454 F. Supp. 652, 679-83 (E.D. Pa. 1978). See also note 92 *supra*.

98. 454 F. Supp. at 683.

99. *Id.* at 677.

100. *See* note 88 *supra*. *See also* Rizzo v. Goode, 423 U.S. 362 (1976). In *Rizzo*, the United States Supreme Court refused to impose any liability upon city officials for alleged claims of police brutality in the absence of evidence that these supervisory officials had adopted, encouraged, or implemented a deliberate policy which violated the respondent's civil rights. *Id.* at 368, 373-77.

101. *See* note 92 *supra*.

but also on that judge's discretion in exercising pendent jurisdiction.[102] If a government agent acts pursuant to official regulations or ordinances, section 1983 liability is clear.[103] Conversely, where the unauthorized acts of a government agent are the subject of litigation, it is equally clear that no section 1983 liability attaches.[104] The more difficult cases are the recurring police brutality cases prevalent in the Third Circuit, for it is questionable whether frequent litigation over this issue establishes a custom.[105]

It is thus submitted that pleading games are encouraged by these uncertainties. Until the Supreme Court definitively approves or rejects respondeat superior liability of municipalities under the fourteenth amendment, there can be no answers for counsel seeking to reach the "deep pocket" municipality through federal suits.

John W. Van Cott

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102. *See* notes 59-64, 82 & 92 *supra*.
103. *See* notes 2-4 and accompanying text *supra*.
104. *See* notes 2-4 and accompanying text *supra*.
105. *See* notes 88 & 100 *supra*.

FEDERAL PRACTICE AND PROCEDURE—FEDERAL ABSTENTION—ABSTENTION BY FEDERAL COURTS WHEN REQUESTED TO ENJOIN STATE CIVIL PROCEEDINGS IS PROPER ONLY WHERE THE STATE IS A PARTY OR WHERE THE STATE CIVIL PROCEEDING IS A CIVIL CONTEMPT ACTION.

Johnson v. Kelly (1978)

Pursuant to a Pennsylvania statute directing a tax sale for nonpayment of local property taxes,[1] defendants purchased property located in Delaware County, Pennsylvania, which was owned by the named plaintiffs.[2] Following this sale, the defendants instituted proceedings to quiet title.[3] While this state action was pending,[4] the plaintiffs brought an action in the United States District Court for the Eastern District of Pennsylvania challenging the constitutionality of the Pennsylvania tax sale statute.[5] The district court dismissed this action[6] pursuant to the doctrine of abstention developed by the United States Supreme Court in *Younger v. Harris*[7] and subsequent cases.[8] On appeal, the United States Court of Appeals for the Third Circuit[9] reversed, *holding* that the *Younger* doctrine is applicable only when the state initiated the state civil proceedings or when the state civil proceeding is a civil contempt action. *Johnson v. Kelly*, 583 F.2d 1242 (3d Cir. 1978).

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1. PA. STAT. ANN. tit. 72, § 5971(g) (Purdon 1968).

2. Johnson v. Kelly, 583 F.2d 1242, 1244 (3d Cir. 1978). The named defendants were Grace Building Company, Inc., Curtis Building Company, Inc., and E. Jack Ippoliti, Prothonotary of the Delaware County Court of Common Pleas. *Id.* Defendant Ippoliti was substituted for Robert F. Kelly, who occupied the office of prothonotary at the time the complaint was filed. *Id.*

3. *Id.* Two of these proceedings, those of named plaintiffs Doris E. Johnson and Joseph Massey were pending in the Delaware County Court of Common Pleas at the time the federal action was filed. *Id.* n.1. A third action, instituted by Joseph and Mary Tunstall, had twice been decided favorably to the plaintiffs, and twice been reversed by the Commonwealth Court of Pennsylvania. *See* Curtis Bldg. Co. v. Tunstall, 36 Pa. Commw. Ct. 233, 387 A.2d 1370 (1978).

4. 583 F.2d at 1244 n.1. The Tunstalls' appeal of the adverse decision in commonwealth court was pending in the Supreme Court of Pennsylvania. *Id.*

5. *Id.* at 1244-45.

Specifically, plaintiffs alleged that the state statute violated the due process clause of the fourteenth amendment "by failing to require a judicial determination of the accuracy of an alleged tax delinquency prior to the County's conducting a tax sale, and by failing to require notice by personal service to a property owner whose land is scheduled to be sold for taxes." *Id.* at 1245. In addition, plaintiffs sought injunctions preventing the tax sale purchasers from commencing or continuing with the state actions to quiet title and preventing the Delaware County prothonotary from filing these actions. *Id.* Finally, plaintiffs requested a district court order requiring that the tax sales of the properties of the plaintiffs who pay to the county treasurer all taxes due and related costs be set aside. *Id.*

6. Johnson v. Kelly, 436 F. Supp. 155, 158 (E.D. Pa. 1977). The district court opinion was written by Judge Ditter.

7. 401 U.S. 37 (1971). *See also* Samuels v. Mackell, 401 U.S. 66 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971).

8. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

9. The case was heard by Chief Judge Seitz and Judges Rosenn and Aldisert. Chief Judge Seitz wrote the opinion of the court. Judge Aldisert wrote the dissenting opinion.

The United States Supreme Court first permitted federal courts to abstain from exercising federal equity jurisdiction where a state proceeding was pending in order to "avoid the waste of a tentative decision as well as the friction of a premature constitutional decision."[10] In *Railroad Commission v. Pullman Co.*,[11] the Supreme Court maintained that "federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the judiciary,"[12] and explained that "[t]he reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court."[13] This abstention doctrine, however, did not deny the complainant access to the federal court where available state proceedings could not adequately protect the constitutional claims presented.[14] Moreover, continued abstention by federal courts

10. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1940).

11. 312 U.S. 496 (1940). In *Pullman*, a railroad company and its porters attacked a Texas state commission regulation requiring Pullman cars to be in the charge of an employee with the rank of conductor at all times. *Id.* at 498. Many trains had but one Pullman car, in the charge of black porters subject to the control of a white conductor. *Id.* at 497-98. The plaintiffs sued in federal court, alleging the unconstitutionality of the state regulation. *Id.* at 498-99.

This early abstention doctrine has been categorized by one commentator in the following manner:

> Abstention allows a federal court whose jurisdiction has been properly invoked to postpone decision, pending trial in a state court, when the result might turn on issues of state law. The resulting procedures can be quite complex. The federal court neither decides the state-law questions nor dismisses the complaint in the exercise of its "equitable" discretion. It denies immediate relief but retains jurisdiction, sending the parties to state courts to obtain a decision on the state-law issues, usually in a declaratory judgment action. Since 1964 the moving party has in theory had the right to return to the federal district court for resolution of the federal questions if he properly reserved his right to do so; res judicata will then not bar relitigation of the federal issues even if the state court has decided them.

Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine In An Activist Era*, 80 HARV. L. REV. 604, 604-05 (1967) (footnotes omitted).

12. 312 U.S. at 501, *citing* DeGiovanni v. Camden Ins. Ass'n, 296 U.S. 64, 73 (1935); Cavanaugh v. Looney, 248 U.S. 453, 457 (1919).

One commentator has criticized the use of the *Pullman* doctrine in the federal courts. *See* Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590 (1977). Specifically, Field has pointed out:

> The delay and expense inherent in the abstention procedure are legendary, and have caused some judges and commentators to bemoan the doctrine from the outset. Those qualities are exacerbated, however, by three less often noted problems with *Pullman* abstention, which I wish to point out here. The first relates to the reviewability of abstention decisions; the second involves the misuse of the abstention procedure to accomplish purposes other than the clarification of state law; the third concerns the possibility that abstention in a particular case will not result in any state supreme court pronouncement on the controverted state law question. I conclude that the abstention procedure is not worth its costs; if state court clarification of the issues is deemed necessary, certification of the issues directly to the state supreme court is a preferable device.

Id. at 591-92 (footnote omitted).

13. 312 U.S. at 500. The *Pullman* abstention doctrine has generally been interpreted as limited to situations in which a state decision could obviate the need for federal constitutional interpretation. *See* Field, *supra* note 12, at 590.

14. 312 U.S. at 501. The majority in *Pullman* noted that on the facts presented, the litigants had an adequate remedy in state court because Texas law furnished the means by which the scope of a state commission's authority could be determined and provided review of administrative orders. *Id.* The construction of state law by the state court may therefore have obviated the

was considered inappropriate where the state court decision to which the federal court had deferred proved inconclusive on the constitutional claims.[15]

Following the *Pullman* decision, the Supreme Court extended the abstention doctrine to encompass state criminal proceedings. In *Younger v. Harris*,[16] the Supreme Court reversed a federal district court injunction of a state criminal proceeding[17] because such action was a violation of national policy forbidding federal courts to stay or enjoin pending state criminal proceedings except under special circumstances.[18] In addition to this traditional rationale for restraining the exercise of federal equity powers,[19] the *Younger* Court based its decision upon the principles of comity.[20] The

necessity of deciding the federal constitutional issue. *Id.* Although the existence of these state remedies did not preclude access to federal courts, the burden was upon the federal plaintiff to show that the state remedy did not protect his constitutional rights. *Id.* The majority noted: "In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hand." *Id.* Later cases have interpreted this passage to require, *inter alia*, a showing of bad faith or harassment by state courts. For a discussion of these cases, *see* note 21 and accompanying text *infra*.

15. 312 U.S. at 501. Since *Pullman* abstention amounts to a stay of a federal court's equity powers, rather than a denial of its jurisdiction, such jurisdiction may be renewed if the state court construction fails to remove the federal constitutional question. *See, e.g.*, England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

16. 401 U.S. 37 (1971). In *Younger*, the defendant was indicted under a California criminal syndicalism statute. *Id.* at 38. he then brought suit in federal district court seeking a declaration that the statute was unconstitutional on its face in that it deprived him of his first amendment freedoms. *Id.* at 38-39. He also requested an order enjoining the Los Angeles County prosecutor from prosecuting him under the statute. *Id.* at 39.

17. *Id.* at 41.

18. *Id.* at 43. Justice Black, in his opinion in *Younger*, explained the reluctance of federal courts to interfere with pending criminal proceedings in the following manner:

> The precise reasons for this longstanding public policy against federal court interference with state proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. The doctrine may have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution, in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted.

Id. at 43-44.

19. The majority in *Younger* noted that this longstanding policy has, since the beginnings of the nation, resulted in Congress "manifest[ing] a desire to permit state courts to try state cases free from interference by federal courts." *Id.* at 43. In 1793 the predecessor to what is now the Anti-Injunction Act was enacted. *See* Judiciary Act of 1793, ch. 22, § 5, 1 Stat. 335. The present statute has not changed substantially. *See* 28 U.S.C. § 2283 (1976). The Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *Id.*

20. 401 U.S. at 44. According to Justice Black, the

> underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to

Younger Court did recognize, however, that the exercise of federal equity jurisdiction might be proper where a threat to the claimant's federally protected rights could not be eliminated by his defense in a single prosecution.[21]

In *Hicks v. Miranda*,[22] the Supreme Court expanded the *Younger* rationale to a situation in which the indictment of a criminal defendant in state court occurred shortly after the defendant had initiated a suit in federal district court seeking an injunction and a declaratory judgment regarding a state statute's constitutionality.[23] The *Hicks* Court dismissed the federal suit, stating that *Younger* applied "where state criminal proceedings are begun against the federal plaintiffs after the complaint is filed but before any proceedings of substance on the merits have taken place in federal court."[24]

The Supreme Court, however, has been hesitant to extend the *Younger* rationale to all cases involving state civil proceedings. In *Huffman v. Pursue, Ltd.*,[25] the Court noted that the comity and federalism aspects of *Younger* were applicable to a civil case which was "closely akin" to a criminal prosecution.[26] The *Younger* interpretation of comity was also utilized by the

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perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism."

Id.

21. *Id.* at 46. Furthermore, the *Younger* majority noted the importance of the Court's decision in Dombrowski v. Pfister, 380 U.S. 479 (1965), which had expressed the power of a federal court to intervene in a state criminal proceeding. 401 U.S. at 47-48. In *Dombrowski*, the Court maintained that where the federal complaint alleges that prosecutions are not "made with any expectation of securing valid convictions, but rather are part of a plan to employ arrests, seizures, and threats of prosecution under color of the statutes" to harass appellants, federal intervention is warranted. 380 U.S. at 482. The majority in *Younger* noted that, notwithstanding broad dicta in *Dombrowski*, the facts in *Dombrowski* brought the case within the exception to the abstention doctrine, and as such, the cases were consistent. 401 U.S. at 50.

In addition, the *Younger* Court noted that federal intervention may be warranted where a state statute was "flagrantly and patently violative of express constitutional prohibitions in every clause." *Id.* at 53-54, *quoting* Watson v. Buck, 313 U.S. 387, 402 (1941). For further discussion of the *Younger* decision, *see* Note, *Implications of the Younger Cases for the Availability of Equitable Relief When No State Prosecution is Pending*, 72 COLUM. L. REV. 874 (1972); Note, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 301 (1971); Note, *Federal Injunctions Against State Prosecutions Reconsidered*, 25 U. MIAMI L. REV. 506 (1971).

22. 422 U.S. 332 (1975).

23. The state court defendant in *Hicks* was the owner of a movie theater from which the police had seized four copies of an allegedly obscene film. *Id.* at 334 & 335 n.2. At the time of the state court indictment, no pretrial motions had been granted or hearings held in the federal case. *Id.* at 338-39.

24. *Id.* at 349. Accordingly, the *Hicks* decision was designed to obviate the problem created by federal plaintiffs in avoiding the *Younger* doctrine by "racing" to the courthouse. *Id.* Justice Stewart noted, however, that the race still existed, but it was now fixed in favor of the states since they could "leave the mark later, run a shorter course, and arrive first at the finish line." *Id.* at 354 (Stewart, J., dissenting). *See also* Note, 21 VILL. L. REV. 317 (1976). After *Hicks*, a prosecution would be considered pending even if the charges were filed after the federal suit was filed, so long as no substantial proceedings on the merits had taken place in federal court. 422 U.S. at 349.

25. 420 U.S. 592 (1975).

26. *Id.* at 604. In *Huffman*, the lessee of a theater, which had been closed by state officials under an Ohio nuisance statute for showing obscene films, brought suit in federal court to enjoin the enforcement of the closure order. *Id.* at 598. The Court noted that, in addition to the

Supreme Court in *Juidice v. Vail*[27] to restrain a federal court from exercising jurisdiction under section 1983.[28] In recognizing the importance of comity,[29] the *Juidice* Court emphasized that the state has significant interests in certain civil matters, and the preservation of the integrity of these interests mandated that the pending state proceeding not be enjoined by a federal court.[30]

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nuisance procedures being quasi-criminal in nature, the comity and federalism aspects of *Younger* were equally applicable to civil as well as criminal cases. *Id.* at 604. Another aspect of *Huffman* extended the definition of "pending state proceeding" to cover state appellate review. *Id.* at 609. The Court stated: "Federal post-trial intervention, in a fashion designed to annul the results of a state trial, also deprives the State of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction." *Id.* After *Huffman,* federal intervention is improper until a litigant has exhausted his state appellate remedies. *Id.* For a discussion of the exhaustion requirement, *see* note 74 *infra.*

Following the *Huffman* decision, the Supreme Court noted the scope of the abstention doctrine. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1975). Particularly, the *Colorado River* Court indicated three areas where federal abstention would be proper:

> (a) Abstention is appropriate "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." . . .
>
> (b) Abstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar . . . .
>
> . . . .
>
> (c) Finally, abstention is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, . . . state nuisance proceedings antecedent to a criminal prosecution, which are directed at obtaining the closure of places exhibiting obscene films, . . . or collection of state taxes.

Id. at 814-16 (citations omitted).

27. 430 U.S. 327 (1977).

28. *Id.* at 329-30. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976). At the time *Younger* was decided, a question existed as to whether injunctive relief under § 1983 of a pending state proceeding was barred by the Anti-Injunction Act, 28 U.S.C. § 2283 (1976). For the text of § 2283, *see* note 19 *supra.*

In Mitchum v. Foster, 407 U.S. 225 (1975), the Supreme Court resolved this question by holding that the Anti-Injunction Act did not constitute a bar to a § 1983 action. *Id.* at 229. Furthermore, the *Mitchum* Court recognized that § 1983, as well as other congressional enactments, including removal statutes, habeas corpus proceedings, and federal interpleader, were express exceptions to the restrictions created by the Anti-Injunction Act. *Id.* at 234-35.

29. 430 U.S. at 334.

30. *Id.* at 335. The *Juidice* court stated:

> A State's interest in the contempt process, through which it vindicates the regular operation of its judicial system, so long as that system affords the opportunity to pursue federal claims within it, is surely an important interest. Perhaps it is not quite as important as is the State's interest in the enforcement of its criminal laws, *Younger, supra,* or even its interest in the maintenance of a quasi-criminal proceeding such as was involved in *Huffman, supra.* But we think it is of sufficiently great import as to require application of the principles of those cases. The contempt power lies at the core of the administration of a State's judicial system.

Id.

In its most recent consideration of the boundaries of the *Younger* doctrine, the Supreme Court once again applied *Younger* to bar a federal court from enjoining a state civil proceeding.[31] In *Trainor v. Hernandez*,[32] the Court viewed a state initiated civil enforcement action as analogous to a criminal proceeding,[33] and held that its prior decisions in *Younger*, *Huffman*, and *Juidice* required abstention under those specific facts.[34] In applying the *Younger* rationale to the circumstances presented in *Trainor*, the Supreme Court, consistent with its prior decisions in *Huffman* and *Juidice*, noted that certain factors were crucial to the decision,[35] and expressed its reluctance to extend the *Younger* approach to state civil proceedings generally.[36]

Although the Supreme Court has not expressly decided whether the *Younger* doctrine is generally applicable to restrain federal courts from enjoining state civil proceedings, several lower federal courts have addressed that issue. In *Ealy v. Littlejohn*,[37] the United States Court of Appeals for the Fifth Circuit concluded that *Younger* and its progeny did not preclude federal injunctive relief in a state civil proceeding where such relief did not threaten proper federal-state relations and was necessary to protect constitu-

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31. *See* Trainor v. Hernandez, 431 U.S. 434, 443 (1977).

32. 431 U.S. 434 (1977).

33. *Id.* at 444-46 & n.8. The federal plaintiffs in *Trainor* had fraudulently concealed assets while applying for welfare benefits. *Id.* at 435. The state, however, rather than prosecute criminally, opted to institute civil proceedings by attaching the property of the appellants for the purpose of obtaining restitution of the welfare payments made. *Id.* at 436. Although the state was a party to the state civil proceeding pending, the statute under which the attachment proceeding was brought did not give the state exclusive rights to bring such actions. *Id.* at 439. *Cf.* Huffman v. Pursue, Ltd., 420 U.S. 592, 595-97 (1974) (nuisance suit, pursuant to which closure of theater showing obscene movies was obtained, could only be instituted by the state).

34. 431 U.S. at 444. The *Trainor* Court limited its application of the *Younger* doctrine to the facts of this case, rather than extending it to civil cases generally. The *Trainor* Court held that "the principles of *Younger* and *Huffman* are broad enough to apply to interference by a federal court with an ongoing civil enforcement action such as this, brought by the State in its sovereign capacity." *Id.* (footnote omitted).

35. *Id.* In particular, the *Trainor* Court indicated that the extension of *Younger* to the present case was warranted because the plaintiff arguably had an adequate remedy in the pending state proceedings. *Id.* at 447 n.10. *See also* Kugler v. Helfunt, 421 U.S. 117 (1975) (state judicial system allowed disqualification of judge alleged to be involved in harassment plot against federal plaintiff). Furthermore, the plaintiffs in *Trainor* had not alleged bad faith, harassment, or any other reason why the state proceeding would be inadequate relief. 431 U.S. at 446-47. *See also* Note, *Of Laboratories and Liberties: State Court Protection of Polticial and Civil Rights*, 10 GA. L. REV. 533 (1976). *But see* Shaman & Turkington, Huffman v. Pursue, Ltd.: *The Federal Courthouse Door Closes Further*, 56 B.U.L. REV. 907, 923-29 (1976).

36. 431 U.S. at 444-46 & n.8. The Supreme Court has sanctioned abstention in a third situation—that in which "difficult questions of state law bearing on policy problems of substantial import whose importance transcends the result in the case at bar" are present. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 815-16 (1975).

37. 569 F.2d 219 (5th Cir. 1978). In *Ealy*, Mississippi police officers shot a black youth, for which they were not immediately prosecuted. *Id.* at 222. After pressure from an association of black citizens induced a grand jury investigation, those very proceedings were used by state officials to harass the association by probing its finances and organizational structure, which bore no relation to the shooting. *Id.* at 229. Suit was filed in federal court requesting injunctive relief. *Id.* at 223-24.

tional rights.[38] The United States Court of Appeals for the Second Circuit evaluated the application of the *Younger* doctrine to civil cases in *Marshall v. Chase Manhattan Bank,*[39] and maintained that "*Younger* abstention has been recently broadened by considerations of comity and federalism to include federal abstention even where the pending state action is civil in nature but where the state has a clear interest."[40] Moreover, the United States Court of Appeals for the Sixth Circuit has held that *Younger* and its progeny mandate abstention in both civil and criminal proceedings. In *Louisville Area Inter-Faith Committee v. Nottingham Liquors, Ltd.,*[41] the Sixth Circuit concluded that the abstention doctrine of *Younger* applied generally to state civil actions because "[i]nterference in state civil proceedings, like interference in state criminal or quasi-criminal proceedings, would preclude state courts 'the opportunity to resolve federal issues arising in (state) courts,' and would . . . 'be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles.'"[42] Subsequently, in *Lamb Enterprises, Inc. v. Kiroff,*[43] the Sixth Circuit reaffirmed its position in *Nottingham Liquors* in requiring federal abstention.[44] The *Kiroff* court found that "*Younger-Huffman* adequately embodies the principles of equitable restraint in a test which is appropriately applied to assess the wisdom of federal court injunction of state civil, as well as the state criminal proceedings."[45]

Confronted with this confusion concerning the scope of the *Younger* doctrine, the *Johnson* court concluded that the Supreme Court's decision in *Trainor* expressly limited the *Younger* abstention doctrine to litigation in which the state civil proceeding was initiated by the state itself.[46] In doing so, the majority distinguished the Supreme Court's utilization of *Younger*

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38. *Id.* at 234. The *Ealy* court held that under these facts, exceptional circumstances of bad faith were shown so as to bring the case within the exception to the *Younger* doctrine. *Id.* at 233. Furthermore, the court stated that the underlying rationale of abstention did not apply, stating that "[g]ranting federal injunctive relief here would not reflect negatively on the ability of state courts to pass on constitutional issues . . . nor jeopardize Mississippi's interest in the enforcement of its laws and smooth functioning of its judicial process." *Id.* at 234 (citations omitted).

39. 558 F.2d 680 (2d Cir. 1977). In *Marshall,* the United States Secretary of Labor sued for injunctive and declaratory relief in federal court, alleging that a trustee could not settle an account in state court with respect to proceeds obtained pursuant to a federal retirement income statute which gave federal courts exclusive jurisdiction. *Id.* at 681-82.

40. *Id.* at 683-84. The court, however, found abstention inappropriate in this case, holding that since neither the Secretary nor the State of New York had ever been a party to the state action for an accounting, the case "does not fall within the ambit of *Huffman, Juidice,* or *Trainor.*" *Id.* at 684.

41. 542 F.2d 652 (6th Cir. 1976). In *Nottingham Liquors,* plaintiffs sought federal injunctive relief from a state court order restraining plaintiffs from mass picketing and mass marching on or near particular business premises. *Id.* at 653.

42. *Id.* at 654 (citations omitted).

43. 549 F.2d 1052 (6th Cir.), *cert. denied,* 431 U.S. 968 (1977).

44. 549 F.2d at 1056. In *Kiroff,* a defendant in a state civil action sought to enjoin any further proceedings in state court and to permanently enjoin the case from being tried therein. *Id.* at 1054-55.

45. *Id.* at 1056-57.

46. 583 F.2d at 1248.

abstention in *Juidice*, a case in which the state was technically not a party,[47] as being restricted to the facts of that case.[48] Chief Judge Seitz, writing for the majority, noted that the doctrine of abstention was a limited exception to the obligation of a district court to adjudicate matters properly before it.[49] More importantly, he stated that if the district court were compelled to abstain from exercising its jurisdiction whenever any state civil action were pending, a plaintiff seeking relief under section 1983[50] would effectively be required to exhaust his state judicial remedies.[51] According to the *Johnson* majority, this result would be entirely inconsistent with principles established by the Supreme Court.[52]

Recognizing that the *Johnson* case provided the Third Circuit with an opportunity to resolve the evasive question concerning the scope of the *Younger* doctrine in civil cases, Judge Aldisert dissented.[53] While noting

47. *See* Juidice v. Vail, 430 U.S. 327 (1977). Chief Judge Seitz, in distinguishing the state court contempt power involved in *Juidice* from the instant case, stated:

> Although technically speaking it is true that the state was not a party to the proceeding enjoined by the district court in *Juidice*, it is readily apparent that an injunction against state court judges, preventing them from exercising state-authorized judicial powers vital to the administration of justice, implicates the federalism and comity strand of the *Younger* doctrine much more severely than would an injunction here preventing private litigants from pursuing their quiet title actions in state court. In exercising his power of civil contempt, a state court judge becomes a real party to the proceedings in a unique way.

583 F.2d at 1249.

48. 583 F.2d at 1249. *See also* Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

49. 583 F.2d at 1249-50. Relying on Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), the Third Circuit noted that "'[t]he doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.'" 583 F.2d at 1249-50, *quoting* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976). For a discussion of *Colorado River*, *see* note 24 *supra*.

50. For the text of § 1983, *see* note 28 *supra*.

51. 583 F.2d at 1252.

52. *Id. See* Monroe v. Pape, 365 U.S. 167 (1961). In *Monroe*, the Supreme Court acknowledged the relationship between § 1983 litigants and the federal court, and maintained that "[i]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." 365 U.S. at 183. Subsequently, the Supreme Court noted that the *Younger* standard must be met to justify federal intervention in a state proceeding where the litigant had not exhausted his state appellate remedies. Huffman v. Pursue, Ltd., 420 U.S. 592, 609 (1975). It is interesting to note that exhaustion of remedies prior to adjudication in a court of law has traditionally been imposed only with respect to administrative rather than judicial remedies. *See* Shaman & Turkington, *supra* note 35, at 921. One commentator has stated:

> The requirement of exhaustion of remedies was developed in the context of administrative law. Indeed, critics of the no exhaustion policy of section 1983 actions buttress their argument for the imposition of an exhaustion requirement by analogy to administrative law contexts. This analogy is unconvincing. When the legislature creates an administrative agency, it does not normally envision judicial review of the agency's decisionmaking process until the agency has exercised its function. The basic principle of administrative law that administrative remedies must be exhausted before judicial review of agency action puts a premium on the expertise and autonomy of the agency in the decision-making process.

Id. (footnotes omitted). *See also* Note, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201 (1968).

53. 583 F.2d at 1252 (Aldisert, J., dissenting).

that section 1983 is an exception to the congressional limitations imposed by the Anti-Injunction Act (Act),[54] Judge Aldisert reasoned that the passage of the Act expressed a congressional policy of noninterference in both criminal and civil state proceedings.[55] Furthermore, he argued that the principles of equity, comity, and federalism, as developed by the *Younger* decision,[56] were equally applicable to state civil proceedings.[57] Judge Aldisert therefore concluded that to avoid abstention and permit federal injunctive relief, the appropriate test should

> require a federal plaintiff to prove (1) exceptional circumstances where irreparable injury is both great and immediate, or (2) the absence of a plain, speedy, and efficient state remedy for the federal wrong, unless there is "proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction."[58]

Moreover, Judge Aldisert noted that the post-*Younger* decisions by the Supreme Court were consistent with this result.[59] He found substantial support in Justice Stevens' dissenting opinion in *Trainor*.[60] Furthermore, while acknowledging that the *Trainor* decision may require the existence of a state interest in order to mandate federal abstention, he noted that "a state

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54. *Id.* *See* note 19 and accompanying text *supra*.

55. 583 F.2d at 1254–55 (Aldisert, J., dissenting). Judge Aldisert cited Mitchum v. Foster, 407 U.S. 225 (1972), as support for the proposition that to construe § 1983 as an express statutory exception to the Anti-Injunction Act did not alter the balance between federal and state jurisdiction. 583 F.2d at 1255 (Aldisert, J., dissenting). *See* note 28 *supra*. Specifically, the *Mitchum* Court held:

> In so concluding [that § 1983 was an exception to the Anti-Injunction Act], we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in *Younger v. Harris*, 401 U.S. 37, and its companion cases. They are principles that have been emphasized by this Court many times in the past.

407 U.S. at 243. If the *Younger* abstention principles were unaffected by the *Mitchum* result, then, according to Judge Aldisert, abstention necessarily remained the rule, not the exception. 583 F.2d at 1255 (Aldisert, J., dissenting).

56. *See* notes 16-21 and accompanying text *supra*.

57. 583 F.2d at 1258 (Aldisert, J., dissenting).

58. *Id.*, *quoting* Perez v. Ledesma, 401 U.S. 82, 85 (1971).

59. 583 F.2d at 1255 (Aldisert, J., dissenting).

60. *Id.* at 1256-57 (Aldisert, J., dissenting). In *Trainor*, Justice Stevens explained:

> The Court explicitly does not decide "whether *Younger* principles apply to all civil litigation." . . . Its holding in this case therefore rests squarely on the fact that the State, rather than some other litigant, is the creditor that invoked the Illinois attachment procedure. This rationale cannot be tenable unless principles of federalism require greater deference to the State's interest in collecting its own claims than to its interest in providing a forum for other creditors in the community. It would seem rather obvious to me that the amount of money involved in any particular dispute is a matter of far less concern to the sovereign than the integrity of its own procedures. Consequently, the fact that a State is a party to a pending proceeding should make it *less* objectionable to have the constitutional issue adjudicated in a federal forum than if only private litigants were involved. I therefore find it hard to accept the Court's contrary evaluation as a principled application of the majestic language in Mr. Justice Black's *Younger* opinion.

431 U.S. at 464 (Stevens, J., dissenting) (emphasis in the original).

has a pronounced interest in maintaining the viability and integrity of its own court system."[61] Accordingly, Judge Aldisert maintained that to the extent that a federal court must abstain from exercising jurisdiction where a state criminal proceeding is pending, a federal court must also restrain its injunctive powers where a state civil case is pending.[62]

It is submitted that the majority opinion in *Johnson* was remiss in failing to discuss the applicability of *Pullman* abstention to the case before it.[63] It is irrelevant that counsel did not appeal the district court's determination of the matter since abstention can be raised by the court *sua sponte*.[64] As the district court observed, the County Return Act[65] had never been upheld under direct constitutional attack,[66] and the Supreme Court of Pennsylvania has never ruled on the propriety of the challenged notice provisions.[67] It is suggested that *Pullman* abstention would have been appropriate since the high court of Pennsylvania could have construed the statute as impliedly requiring personal service, thereby removing the constitutional question.[68]

Moreover, in disposing of the *Younger* issue, the majority cited *Colorado River Water Conservation District v. United States*[69] to support the proposition that abstention was a narrow exception to the necessity of ad-

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61. 583 F.2d at 1257 (Aldisert, J., dissenting).

62. *Id.* at 1258 (Aldisert, J., dissenting).

63. *See* notes 10-15 and accompanying text *supra*.

64. *See* Belloti v. Baird, 428 U.S. 132, 143 n.10 (1976). Naylor v. Case and McGrath, Inc., 585 F.2d 557, 563 (2d Cir. 1978); Brown v. First Nat'l City Bank, 503 F.2d 114, 117-18 (2d Cir. 1974).

65. *See* note 1 and accompanying text *supra*.

66. 436 F. Supp. at 165. The *Johnson* district court stated that while several lower Pennsylvania courts had held that the only statutory requirement was that proper notice be given, no Pennsylvania court had ever upheld the Country Return Act in the face of a direct constitutional attack. *Id.*

67. *See id.* & n.23. The district court noted that the Supreme Court of Pennsylvania has been very sympathetic to the due process claims of those facing loss of their property from tax sales, albeit in other contexts. *Id.* at 166. *See, e.g.*, March v. Banus, 395 Pa. 629, 151 A.2d 612 (1959); Shafer v. Hansen, 389 Pa. 500, 133 A.2d 538 (1956).

68. *See* Field, *supra* note 12, for a discussion of the purpose of the *Pullman* doctrine. The district court dismissed the applicability of the *Pullman* doctrine to the *Johnson* case primarily upon the Supreme Court's decision in Wisconsin v. Constantineau, 400 U.S. 433 (1971). 436 F. Supp. at 162. Based upon its facts, however, *Constantineau* should not be given such controlling weight. In *Constantineau*, the Supreme Court was confronted with a state statute which contained no express provisions for hearing and notice. 400 U.S. at 434, 439. In discussing whether the federal court should abstain from exercising jurisdiction, Justice Douglas noted that "[w]here there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim." *Id.* at 439. Since the statute did not provide for hearings and notice, Justice Douglas concluded that the federal court could decide the issue. *Id.*

In *Johnson*, however, the Pennsylvania statute did contain express provisions for notice. *See* PA. STAT. ANN. tit. 72, § 5971(g) (Purdon 1968). Conceivably, the pertinent provisions of the statute were consistent with prevailing notions of due process at the time of enactment. Hence, the Supreme Court of Pennsylvania could have interpreted the legislative intent to grant the most liberal procedural protections and thereby implied personal service. It is submitted that the instant case, in contrast to *Constantineau*, could have furnished an opportunity for the state forum to protect the litigant's constitutional rights.

69. 424 U.S. 800 (1975). *See* note 26 *supra*.

judicating a controversy properly before the federal court.[70] In *Colorado River*, however, the Supreme Court enumerated the situations in which *Younger* abstention applied,[71] including a case involving the collection of state taxes.[72] Arguably, therefore, even if *Colorado River* allows only a narrow exception to the obligation of federal courts to adjudicate matters properly before them, that exception may have been present in *Johnson*.[73]

Furthermore, the majority's argument that the practical effect of extending *Younger* to civil cases generally would be to infuse a requirement of exhaustion of state judicial remedies before a section 1983 plaintiff could file a federal suit is subject to criticism.[74] The majority based its conclusion on

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70. 583 F.2d at 1252, *citing* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1975).

71. 424 U.S. at 814-16. *See* note 26 *supra*.

72. *See* 424 U.S. at 816, *citing* Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943). The Supreme Court in *Great Lakes* stated:

> This Court has recognized that the federal courts, in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily restrain state officers from collecting state taxes where state law affords an adequate remedy to the taxpayer. . . . This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts, or of the settled rule that the measure of inadequacy of the plaintiff's legal remedy is the legal remedy afforded by the federal not the state courts. . . . On the contrary, it is but a recognition that the jurisdiction conferred on the federal courts embraces suits in equity as well as at law, and that a federal court of equity, which may in an appropriate case refuse to give its special protection to private rights when the exercise of its jurisdiction would be prejudicial to the public interest . . ., should stay its hand in the public interest when it reasonably appears that private interests will not suffer.

Id. at 297-98 (citations omitted). In addition to the language of *Great Lakes*, which was not a § 1983 case, Congress has enacted a statutory prohibition which bars federal courts from enjoining states in tax matters. *See* 28 U.S.C. § 1341 (1976). Specifically, § 1341 provides: "The district courts shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under state law where a plain, speedy, and efficient remedy may be had in the courts of such State." *Id.* Thus, if *Colorado River* is controlling as to when abstention is appropriate, the Third Circuit in the instant case may have erred in not dismissing the suit under the *Great Lakes* exception to federal intervention.

73. The district court, relying on *Younger* to dismiss the case, failed to decide the question of whether the instant case would fall within the purview of § 1341. *See* 436 F. Supp. at 158 n.5.

74. *See* 583 F.2d at 1250. *Huffman* required a losing state litigant to exhaust his state appellate remedies. *See* 420 U.S. at 609. Exhaustion of appellate remedies, it is submitted, is not tantamount to a total exhaustion requirement. As the Court in *Huffman* noted:

> By requiring exhaustion of state appellate remedies for the purposes of applying *Younger*, we in no way undermine *Monroe v. Pape*, 356 U.S. 167 (1961). There we held that one seeking redress under 42 U.S.C. § 1983 for a deprivation of federal rights need not first initiate state proceedings based on related state causes of action. 356 U.S. at 183. *Monroe v. Pape* had nothing to do with the problem presently before us, that of the deference to be accorded state proceedings which have already been initiated and which afford a competent tribunal for the resolution of federal issues.
>
> Our exhaustion requirement is likewise not inconsistent with such cases as *City Bank Farmers Trust Co. v. Schnader*, 291 U.S. 24 (1934), and *Bacon v. Rutland R. Co.*, 232 U.S. 134 (1914), which expressed the doctrine that a federal equity plaintiff challenging state administrative action need not have exhausted his state judicial remedies. Those cases did not deal with situations in which the state judicial process had been initiated.

Id. n.21. Moreover, at least one commentator has offered grounds distinguishing Monroe v. Pape, 365 U.S. 167 (1961), from cases involving a request for federal injunctive relief:

the assumption that *Younger*, when read in light of *Hicks v. Miranda*,[75] would allow a federal defendant to avoid litigating in the federal forum by counterfiling in state court at any time prior to substantial proceedings on the merits in federal court.[76] Prior to *Johnson*, however, no federal court had applied the *Hicks* definition of "pending state proceeding" in a civil context. Since *Hicks* was a criminal case, it is submitted that its rationale is not necessarily applicable in a section 1983 context. Rather, the greater state interest in protecting the integrity of its criminal proceedings[77] warrants a liberal construction of when "substantial federal proceedings" have begun for abstention purposes. In a civil case, conversely, it is reasonable for either forum to respect the initial filing of the complaint in the other forum,[78] and if *Hicks* does not apply, a section 1983 litigant could still bypass state courts without fear that a countersuit in state court would require federal abstention.[79]

Finally, as Judge Aldisert appropriately noted, a construction of *Trainor* which limits abstention to cases where a state is a party loses sight of the policies of comity and federalism which underlie the *Younger* doctrine.[80] As Justice Stevens acknowledged in *Trainor*, "the fact that a State is a party to a pending proceeding should make it *less* objectionable to have the constitutional issue adjudicated in a federal forum than if only private litigants were involved."[81]

As a result of the Third Circuit's decision in *Johnson*, the decisional split among the circuits concerning the applicability of the *Younger* doctrine to civil proceedings has been clearly delineated.[82] In view of the Burger

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> It is true, however, that the plaintiff in *Monroe* was not required to pursue a state cause of action despite the absence of any showing that the state remedy was unavailable in practice or unfairly administered. This might be explained by the fact that *Monroe* was an action for damages and there is doubt whether the federal courts have power to refuse to act when legal rather than equitable relief is sought.

Note, *supra* note 52, at 1204 (footnotes omitted).

75. 422 U.S. 332 (1975). *See* notes 22-24 and accompanying text *supra*.

76. 583 F.2d at 1250, 1252.

77. It is submitted that one must distinguish between the issue of the applicability of *Younger* abstention and the related issue of what constitutes a pending proceeding for the purposes of *Younger* abstention. *Juidice* recognized that *Younger* abstention may apply notwithstanding the fact that the state interest protected may be a lesser one than the criminal system. 420 U.S. at 335. Assuming that *Younger* abstention applies to state interests of varying importance, it is submitted that where the state interest protected is of greater importance, the state should be allowed the greater opportunity to adjudicate the case, and not be overriden by technical considerations such as filing dates. This is precisely what the Court held in *Hicks*. *See* notes 22-24 and accompanying text *supra*. Since *Hicks* was a criminal case, it is submitted that the Court's liberal interpretation of a pending state proceeding was necessary to protect the integrity of the state interest, which the *Juidice* Court ranked above civil matters, and not a broad mandate applicable to all state interests possibly within the purview of *Younger* abstention. *See generally* Bartels, *Avoiding A Comity Of Errors: A Model For Adjudicating Federal Civil Suits That "Interfere" With State Civil Proceedings*, 29 STAN. L. REV. 29 (1976).

78. *See* Bartels, *supra* note 77, at 64 & n.205.

79. *See* notes 22-24 & 52 and accompanying text *supra*.

80. 583 F.2d at 1252 (Aldisert, J., dissenting).

81. 431 U.S. at 464 (Stevens, J., dissenting) (emphasis in original). *See also* note 60 *supra*.

82. *See* notes 37-45 and accompanying text *supra*.

Court's tendency to restrict access to the federal courts,[83] it is submitted that the Court, if it chooses to define the boundaries of the *Younger* doctrine, will adopt the rationale of the United States Court of Appeals for the Sixth Circuit in *Nottingham Liquors* and *Kiroff*.[84] As the Supreme Court retreats from the expansive jurisprudential philosophy of the Warren era,[85] the steady advance of the doctrine of abstention should continue until there exists pervasive federal abstention wherever a state claim, either criminal or civil, is pending.

Absent Supreme Court adjudication, however, the issue is far from resolved despite the *Johnson* majority's refusal to extend the doctrine of *Younger* abstention to cases in which the state was not a party to the pending civil claim.[86] The conflicting rationale advanced by Judge Aldisert[87] and the Sixth Circuit[88] will further the confusion among the lower federal courts. Such a dichotomy is unavoidable, however, as it rests, as must any ultimate resolution by the Supreme Court, upon the philosophical perspectives of the decision maker with respect to the accessibility to the federal courts.

Kevin Silverang

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83. *See* Note, *Section 1983 and Federalism: The Burger Court's New Direction*, 28 U. FLA. L. REV. 904, 905 (1976).

84. *See* notes 41-45 and accompanying text *supra*.

85. *See* Dombrowski v. Pfister, 380 U.S. 479 (1965). *See also* note 21 *supra*.

86. 583 F.2d at 1252. *See* notes 46-52 and accompanying text *supra*.

87. 583 F.2d at 1252-58 (Aldisert, J., dissenting). *See* notes 53-62 and accompanying text *supra*.

88. *See* notes 41-45 and accompanying text *supra*.

FEDERAL PRACTICE AND PROCEDURE—FEDERAL RULE OF EVIDENCE 804(b)(1)—FORMER TESTIMONY EXCEPTION TO THE HEARSAY RULE—A SUFFICIENT COMMUNITY OF INTEREST SATISFIES THE "PREDECESSOR IN INTEREST" LANGUAGE OF THE RULE.

Lloyd v. American Export Lines, Inc. (1978)

Alvarez and Lloyd, two seamen employed by American Export Lines, Inc. (Export), were involved in an altercation while aboard the S.S. Export Commerce.[1] Alleging negligence under the Jones Act[2] and unseaworthiness under general maritime law,[3] Lloyd sued Export in the United States District Court for the Eastern District of Pennsylvania to recover for personal injuries.[4] Export joined Alvarez as a third-party defendant, and Alvarez counterclaimed against Export for negligence and unseaworthiness.[5] The district court dimissed Lloyd's complaint for failure to prosecute.[6]

The counterclaim by Alvarez was tried, however, and the jury returned a verdict for Export on the unseaworthiness claim, but awarded $95,000 to Alvarez on the negligence claim.[7] The district court had refused to admit into evidence testimony concerning the fight aboard ship and the history of animosity between the two men given by Lloyd at a prior Coast Guard proceeding.[8] Alvarez' testimony thus stood uncontradicted at trial.[9] The United

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1. Lloyd v. American Export Lines, Inc., 580 F.2d 1179, 1181 (3d Cir. 1978). The ship was anchored in the port of Yokohama, Japan, at the time of the fight. *Id.*

2. 46 U.S.C. § 688 (1970). The purpose of the Jones Act is to benefit and protect seamen who are peculiarly the wards of admiralty. The Arizona v. Anelich, 298 U.S. 110, 123 (1935). The Jones Act reads in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . . Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

46 U.S.C. § 688 (1970).

3. 580 F.2d at 1181. For a definition of "unseaworthiness," *see* Klarman v. Santini, 363 F. Supp. 910, 915 (D. Conn. 1973) ("unseaworthiness" is a condition which arises from a defect in a vessel's hull, gear, appurtenances, and in some circumstances, her crew); Franklin v. Doric Shipping and Trading Corp., 357 F. Supp. 1132, 1135 (W.D. La. 1972) ("unseaworthiness" is a condition whereby a vessel or its equipment or method is not reasonably fit).

4. 580 F.2d at 1184. Lloyd was hospitalized for almost a month as a result of his injuries from the fight. *Id.* Federal judisdiction is provided under the Jones Act, 46 U.S.C. § 688 (1970). *See* note 2 *supra*.

5. 580 F.2d at 1181.

6. *Id.* Lloyd failed to appear on seven occasions for a pretrial deposition. *Id.* Furthermore, Lloyd's counsel was unable to procure his appearance for trial despite extensive efforts. *Id.* at 1184. These failures were partly attributable to Lloyd's seafaring occupation. *Id.*

7. *Id.* at 1181.

8. *Id.* at 1182. The prior proceeding was held at the discretion of the Coast Guard to determine whether Lloyd's merchant marine license should be suspended or revoked for misconduct based on the fight with Alvarez. *Id.* Testimony was received under oath before a professional hearing examiner, allowing both direct and cross-examination. *Id.* Both Lloyd and Alvarez were represented by counsel. *Id.* The two charges brought against Lloyd of assault and failure to perform his duties due to intoxication were dismissed. *Id.* at 1183.

States Court of Appeals for the Third Circuit[10] reversed and remanded, *holding* that a sufficient community of interest between Alvarez and the Coast Guard satisfied the predecessor in interest requirement of rule 804(b)(1) of the Federal Rules of Evidence (rule 804(b)(1) or rule)[11] so as to allow Lloyd's former testimony to be admitted into evidence in the subsequent trial. *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir. 1978).

Testimony given in a prior proceeding, known as former testimony, traditionally has been recognized as an exception to the hearsay rule.[12] The hearsay rule requires that all statements offered for the truth of the matter asserted[13] be proffered by a witness testifying under oath,[14] subject to cross-examination,[15] while in the presence of the trier of fact.[16] These

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The district court had also refused to admit into evidence a Coast Guard Decision and Order and a prior conviction against Alvarez resulting from a criminal proceeding in Japan concerning the fight with Alvarez. *Id.* at 1183, 1190.

9. *Id.* at 1182. Alvarez and Lloyd, as participants, were the only eyewitnesses to the fight. Since Lloyd was unavailable as both a plaintiff and witness, Alvarez' version of the altercation went to the jury unopposed. *Id.*

10. The case was heard by Chief Judge Seitz and Judge Aldisert, and Judge Stern of the United States District Court for the District of New Jersey, sitting by designation. Judge Aldisert wrote the majority opinion. Judge Stern wrote a concurring opinion.

11. Rule 804(b)(1) of the Federal Rules of Evidence provides in pertinent part:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding . . . if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

FED. R. EVID. 804(b)(1).

12. *See* Mattox v. United States, 156 U.S. 237, 244 (1896); Comment, *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, 15 WAYNE L. REV. 1201 (1969).

13. One commentator offers the following definition of hearsay: "Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 246, at 584 (2d ed. 1972). Hearsay as defined in the Federal Rules of Evidence "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). *See also* Donnelly v. United States, 228 U.S. 243, 273 (1913).

14. *See* Bridges v. Wixon, 326 U.S. 135, 153 (1945) (an oath acts as a safeguard against false testimony by providing fear of prosecution for perjury).

15. *See* Novicki v. Department of Fin., 373 Ill. 342, 344, 26 N.E.2d 130, 131 (1940) (rule against hearsay evidence founded on necessity of an opportunity for cross-examination); Sconce v. Jones, 343 Mo. 362, 369, 121 S.W.2d 777, 781 (1938) (reason for excluding testimony made out of court is that the test of cross-examination is unavailable as a safeguard against inaccuracies).

Professor Wigmore offers several reasons why cross-examination is essential. He has noted that cross-examination of a witness promotes extraction of the remaining qualifying circumstances left undisclosed by direct examination. 5 J. WIGMORE, WIGMORE ON EVIDENCE § 1368, at 37 (Chadbourn rev. 1974). Cross-examination may also be the only available means of testing the credibility or personal trustworthiness of the witness. *Id.* One major advantage is that cross-examination immediately follows the direct examination in time, so that any modifications or discredit produced by the elicited facts more readily confronts the tribunal. *Id.* at 38.

common law requirements were designed to insure the utilization of the most credible testimony available by affording the trier of fact an opportunity to directly evaluate the perception, memory, and narration of the witness.[17] The hearsay rule, however, is replete with exceptions[18] based on necessity and guarantees of trustworthiness.[19]

Admission of former testimony, a specific exception to the hearsay rule, initially required that the declarant be unavailable to testify.[20] A common

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Finally, the witness himself may refute implications made by the cross-examiner, thus making his testimony more readily believed. *Id.*

16. *See* Douglas v. Alabama, 380 U.S. 415, 418-19 (1965). The *Douglas* Court observed that personal testimony by the witness compels him to stand "face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Id.* at 419, *quoting* Mattox v. United States, 156 U.S. 237, 242-43 (1895).

17. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948). The problem of narration arises "[w]here the evidence of Declarant's conduct is offered for a purpose which requires [the] Trier to rely upon the meaning with which Declarant himself used the language." *Id.* at 197. Sincerity is sometimes considered a fourth factor in evaluating the testimony of a witness, but it is encompassed within the other three, 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 800-01 (1977) [hereinafter cited as WEINSTEIN & BERGER].

18. *See* Sabatino v. Curtiss Nat'l Bank, 415 F.2d 632, 636 (5th Cir.), *cert. denied*, 396 U.S. 1057 (1969) (two basic tests for exceptions to hearsay rule are: 1) that evidence must be necessary to a proper consideration of the case; and 2) that the evidence exhibit an intrinsic probability of trustworthiness); Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 396 (5th Cir. 1961) (hearsay rule is not absolute but replete with exceptions; necessity means that unless hearsay statement is admitted, the facts it elicits may be lost, either because the declarant is dead or unavailable or because evidence of similar value cannot be obtained); United States v. Wescoat, 49 F.2d 193, 195 (4th Cir. 1931) (trustworthiness exists when entries are made by officials in discharge of their duties with no motive to state anything but the truth, and where they are subject to reprimand and humiliation in the eyes of associates if inaccurate).

19. *See generally* C. MCCORMICK, *supra* note 13, § 255, at 616-17. Illustrative of considerations reviewed in developing a hearsay exception is rule 804(b)(5) of the Federal Rules of Evidence, which states in pertinent part:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence . . . .

FED. R. EVID. 804(b)(5).

20. Wong Wing Foo v. McGrath, 196 F.2d 120, 122-23 (9th Cir. 1952); Smyth v. Inhabitants of New Providence Township, 263 F. 481 (3d Cir. 1920).

Rule 804(a) of the Federal Rules of Evidence defines unavailability of a witness to include situations when the declarant

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
>
> (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
>
> (3) testifies to a lack of memory of the subject matter of his statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

law requirement of an identity of parties and issues also developed as a requisite to admission.[21] Judicial practice traditionally mandated that in order for former testimony to be introduced against a party in a later trial, that party or someone with whom he was in privity[22] must have been a party to the proceeding in which that testimony was originally elicited.[23]

In promulgating the Federal Rules of Evidence,[24] the United States Supreme Court examined the question of whether strict identity or privity

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(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of the hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

FED. R. EVID. 804(a).

Unavailability of the witness as a requisite to admitting hearsay evidence distinguishes rule 804 from rule 803. *Cf.* FED. R. EVID. 803. Rule 803 allows hearsay into evidence regardless of whether the witness is available or not. *Id.* It "proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available." Advisory Committee's Note, FED. R. EVID. 803. Rule 804, however, by requiring that the declarant be unavailable, proceeds upon a different theory: "[T]estimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of evidence of the declarant." Advisory Committee's Note, FED. R. EVID. 804.

21. *See* Smyth v. Inhabitants of New Providence Township, 263 F. 481, 486-87 (3d Cir. 1920) (testimony given by deceased witness in another action between substantially the same parties and involving substantially the same issue admitted); Wolf v. United Air Lines, 12 F.R.D. 1, 3 (M.D. Pa. 1951) (testimony given in prior action is admissible if there is an identity of issues and an identity of parties).

22. For cases which state that "privies" means claiming under the former parties, *see* McAlister v. Dungan, 108 Cal. App. 185, 188, 291 P. 419, 420 (1930); Inhabitants of Ellsworth v. Inhabitants of Waltham, 125 Me. 214, 215, 132 A. 423, 424 (1926). *See also* Metropolitan St. Ry. Co. v. Gumby, 99 F. 199 (2d Cir. 1900) (the newcomer must be in privity with the former party in blood, in estate, or in law); S.W. Anderson Co. v. Glenn, 43 F. Supp. 334, 338 (W.D. Ky. 1942) (identity of parties comprehends privies in blood, in law and in estate). *Cf.* Northwestern Mut. Life Ins. Co. v. Linard, 57 F.R.D. 552, 554-55 (S.D.N.Y. 1972) (prior testimony exception to hearsay rule requires identity of interest and motive between party opponents); Bartlett v. Kansas City Pub. Serv. Co., 349 Mo. 13, 20, 160 S.W. 2d 740, 745 (1942) (test is one of identity of interests between party–opponents and not of privity as term used in the law of property).

Some commentators have found the application of privity too rigid a concept in accordance with the notions of necessity and trustworthiness warranting the exception to the hearsay rule. C. MCCORMICK, *supra* note 13, § 256, at 620; J. WIGMORE, *supra* note 15 § 1388, at 118.

The judicial practice of requiring privity between the party against whom such testimony was offered previously and the party against whom the prior testimony is offered presently is analogous to the privity requirement applicable in the res judicata and estoppel doctrines. Wigmore dismisses any similarities between the former testimony rule and res judicata and estoppel principles as too mechanical. *Id.* at 119. Wigmore states that the rules of property law investigated under res judicata and collateral estoppel should not be relied upon in solving an evidentiary question because the judicial concerns in admitting former testimony focus upon whether a thorough and adequate cross–examination has been performed. *Id.*

23. United States v. Allison, 474 F.2d 286, 288 (5th Cir.), *cert. denied*, 419 U.S. 851 (1973) (under proper circumstances, testimony from grand jury proceedings may be admitted under prior reported testimony exception to hearsay rule); Tug Raven v. Trexler, 419 F.2d 536, 542-43 (4th Cir. 1969) (testimony given at Coast Guard proceeding admissible); Bailey v. Woods, 17 N.H. 365, 372 (1845) (testimony given in hearing before arbitrators admitted).

24. The original Advisory Committee draft of the Federal Rules of Evidence was published in 1969 and revised by the Supreme Court, House of Representatives, and the Senate before it became effective on July 1, 1975. 1 WEINSTEIN & BERGER, *supra* note 17, at vii-xi. *See* H.R. 5463, 93d Cong., 2d Sess. (1975).

between parties should remain a requirement with respect to the party against whom such testimony is offered,[25] and eliminated a strict identity requirement in its draft of the rules presented to the House of Representatives.[26] The Supreme Court draft, however, was amended by the House Committee,[27] which narrowed the scope of parties capable of utilizing former testimony by inserting the "predecessor in interest" language contained in the rule.[28] The Senate found little difference between the two versions and adopted the House amendment.[29]

The "predecessor in interest" language[30] included in the adopted rule lacks significant judicial interpretation,[31] as only two cases have attempted to analyze the rule. In *In re Master Key Antitrust Litigation*,[32] a federal antitrust action led to the initiation of a private class action suit in which defendants sought to introduce the testimony of a witness from the prior federal

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25. WEINSTEIN & BERGER, *supra* note 17, at 804-20.

26. *Id.* at 804-21. Modern authority supports the trend away from strict identity of parties to an identity of interests characterization. *See* Tug Raven v. Trexler, 419 F.2d 536, 542-43 (4th Cir. 1969) (testimony at Coast Guard proceeding admissible in wrongful death action); Bartlett v. Kansas City Pub. Serv. Co., 349 Mo. 13, 21, 160 S.W.2d 740, 745 (1942) (testimony in suit by husband admissible in suit by wife); Travelers Fire Ins. Co. v. Wright, 322 P.2d 417, 421 (Okla. 1958) (testimony against one partner in arson trial admissible in action on fire policy by partners).

27. Congress added the language shown in italics and deleted the bracketed material from the Supreme Court rule:

> (1) Former testimony—Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of *the same or* another proceeding, [at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered,] *if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.* WEINSTEIN & BERGER, *supra* note 17, at 804-07.

The House Committee stated that

> [t]he essential difference between the two versions is the House's substitution of the common law's "same party" or "predecessor in interest" test in place of the more simple "with motive and interest similar to those of the party against whom offered" test provided in the subsection as submitted by the Court.

Id. quoting Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States and the Advisory Committee on Rules of Evidence, at 53-54.

These policy determinations were evidenced in the House of Representatives Judiciary Committee's Report, which

> [c]onsidered it generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this . . . is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness.

WEINSTEIN & BERGER, *supra* note 17, at 804-07, 808, *quoting* HOUSE COMM. ON JUDICIARY, H.R. REP. NO. 93-650, 93d Cong., 1st Sess. 15 (1973).

28. WEINSTEIN & BERGER, *supra* note 17, ¶ 804(b)(1)[05], at 804-65.

29. *See* SENATE COMMITTEE ON JUDICIARY, S. REP. NO. 93-1277, 93d Cong., 2d Sess. at 28 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7074.

30. *See* note 11 *supra*.

31. To date, there is no case law interpreting identical state rules of evidence. *See, e.g.*, ARK. UNIF. R. EVID. 804(b)(1); ME. R. EVID. 804(b)(1).

32. 72 F.R.D. 108 (D.Conn.), *aff'd*, 551 F.2d 300 (2d Cir. 1976).

trial.[33] In determining whether the United States Government could be deemed the "predecessor in interest" of the private litigants for rule 804(b)(1) purposes, the court concluded that "special considerations" made the Government the predecessor in interest in the prior action.[34] Due to the "unique relationship between the Government's antitrust enforcement suits and the private actions which follow,"[35] the court admitted the prior testimony.[36]

• The United States District Court for the Northern District of California refused to apply the "unique relationship" test established in *Master Key* to determine the admissibility of prior testimony in *In re IBM Peripheral EDP Devices Antitrust Litigation.*[37] In this consolidated antitrust suit,[38] defendants sought a pretrial resolution concerning admission of former testimony from three designated cases in which it had been a party.[39] Plaintiff objected to the use of such testimony on a hearsay basis since it had not been a party to these previous cases.[40] Defendant claimed that in each of the three prior cases there was a party "with the opportunity to examine and with a motive similar or identical to that which . . . [the plaintiff] now has to develop the testimony by direct, cross or redirect examinations."[41] Referring to the legislative history of rule 804(b)(1),[42] however, the court found that Congress had expressly rejected that argument.[43] The defendant also claimed that the plaintiffs in the prior cases were predecessors in interest of the current plaintiff.[44] The court, however, adopted a narrow, literal definition of "predecessor in interest,"[45] thus precluding admission of the former testimony from those cases.[46]

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33. 72 F.R.D. at 109.

34. The court concluded:

> [T]here are special considerations which weigh in favor of holding that the United States was a predecessor in interest of the present plaintiffs. The unique relationship between the Government's antitrust enforcement suits and the private actions which follow has Congressional recognition and ratification, which has in turn provided special benefits to the private plaintiffs. It has, for example, tolled the applicable statute of limitations, and thus allowed them to extend the period for which they may recover. . . . Furthermore, the judgment in the earlier decision will be admissible in evidence (although it too is hearsay) and serves to establish their *prima facie* case.

35. *Id.*

36. *Id.*

37. 444 F. Supp. 110, 113 (N.D. Cal. 1978). The matter before the court arose on a motion to overrule objections to the admission of relevant former testimony. *Id.* at 111.

38. Two separate suits were brought against IBM and were consolidated for trial. *Id.* at 110. ILC Peripherals Leasing Corporation was the plaintiff in one action, and Memorex Corporation was the plaintiff in the other. *Id.*

39. *Id.* at 112.

40. *Id.*

41. *Id.* at 113.

42. *See* notes 24-29 and accompanying text *supra*.

43. 444 F. Supp. at 113.

44. *Id.*

45. The court quoted Judge Weinstein as follows:

> The term "predecessor in interest" was apparently used in its old, narrow, substantive law sense. It could not have been used in an evidentiary sense, where probative force would

The *Lloyd* court began its analysis of rule 804(b)(1) by determining that Lloyd was unavailable at the time of the trial.[47] The court then addressed the question of whether Alvarez or a predecessor in interest had the "'opportunity and similar motive to develop the testimony by direct, cross or redirect examination' as required by 804(b)(1)."[48] The court rejected the district court's strict view of the rule and its refusal under that interpretation to admit the proffered evidence.[49] Since Congress had failed to define "predecessor in interest,"[50] the court examined the legislative history of the rule in order to determine congressional intent.[51] Having compared the Supreme Court draft originally submitted[52] with the rule finally adopted by Congress,[53] the Third Circuit adopted the Senate Committee's conclusion that little difference existed between the two versions.[54] In its analysis, the court considered the goal of section (b) of the rule as a whole,[55] noting that its purpose was to balance the recognized risk of denying the fact finder important relevant evidence and the risk of introducing testimony by a non-witness.[56]

Due to the similarity between the proffered Court draft and the adopted rule, and the fact that the Supreme Court version would have relaxed the privity requirement necessary under common law,[57] the Third Circuit concluded that rule 804(b)(1) would allow the former testimony to be admitted into evidence as long as there existed a "sufficient community of interest shared by the Coast Guard in its hearing and Alvarez in the sub-

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be its rationale, since it would then be equivalent to "those having similiar motive and opportunity to develop the testimony"—a concept rejected by Congress.

Id., *quoting* WEINSTEIN & BERGER, *supra* note 17, ¶ 804(b)(1)[04], at 804-65.

46. 444 F. Supp. at 113.

47. 580 F.2d at 1184. In regard to the unavailability status of Lloyd as a witness, the court ruled: "We are satisfied that where Export and Lloyd's counsel were unable to obtain his appearance in an action in which he had a formidable interest as a plaintiff, his unavailability status was sufficient to satisfy the requirement of Rule 804." *Id.* For a discussion of the unavailability rule, *see* note 20 and accompanying text *supra*.

48. 580 F.2d at 1184-85.

49. *Id.* at 1185.

50. *Id.*

51. *Id.* Although the *Lloyd* court found "no definitive guidance in the reports accompanying the language changes made as the Rules were considered, in turn, by the Supreme Court and houses of Congress," *id.*, it did take into consideration that, in agreement with the Senate Committee, the additional language of "predecessor in interest" did little to distinguish the congressional rule from the Supreme Court draft. *Id. See* S. REP. NO. 93-1277, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7074.

52. 580 F.2d at 1185.

53. *Id.* For the changes that the House made in the Supreme Court draft, *see* note 27 *supra*.

54. *Id. See* text accompanying note 29 *supra*.

55. 580 F.2d at 1185. Section (b) of rule 804 has five subdivisions entitled: 1) Former testimony; 2) Statement under belief of impending death; 3) Statement against interest; 4) Statement of personal or family history; and 5) Other exceptions. FED. R. EVID. 804(b).

56. 580 F.2d at 1185. The *Lloyd* court adopted this view under the preference approach to the hearsay exception expressed by the drafters of the rule.

57. For the text of the Supreme Court's draft of rule 804(b)(1), *see* note 27 and accompanying text *supra*.

sequent civil trial."[58] The court developed this community of interest concept by equating public and private interest.[59] It found that the individual and public interests merged[60] in the case *sub judice* because the nucleus of operative facts was the same in the Coast Guard proceeding and the subsequent civil trial,[61] and the basic interest advanced by the Coast Guard and Alvarez coincided.[62] Moreover, the court asserted that the principles underlying the exception to the hearsay rule focus on the ultimate search for truth and justice.[63] The Third Circuit thus offered what it considered to be a "practical and expedient view" of rule 804(b)(1) that furthered the congressional intent behind its promulgation.[64]

58. 580 F.2d at 1185-86. The *Lloyd* court substituted this "community of interest" analysis for a literal interpretation of the rule: "With this approach in mind, we are satisfied that there existed, in the language of Rule 804(b)(1), sufficient 'opportunity and similar motive [for the Court Guard investigating officer] to develop [Lloyd's] testimony' at the former hearing to justify its admission. . . ." *Id.* at 1186-87 (brackets supplied by the court).

The majority never explicitly considered a privity analysis in its interpretation of "predecessor in interest." Judge Stern, in a concurring opinion, specifically disagreed with the majority, asserting that privity between the Coast Guard officer and Alvarez must be present if Lloyd's former testimony were to be admitted under rule 804(b)(1). *Id.* at 1190-92 (Stern, J., concurring). For a discussion of Judge Stern's concurring opinion, *see* notes 65-69 and accompanying text *infra*.

59. 580 F.2d at 1186. The court based its community of interest formula on a merger of both public and private interests. *Id.* Since the court reasoned that interests in law came from individuals either collectively or singularly, the Coast Guard, as a representative of the larger public interest, sought to satisfy the very interests that Alvarez as an individual subsequently brought before the district court. *Id.* The court noted that Alvarez sought to protect his individual interest in seeking compensation for his injuries while the Coast Guard sought to protect the public interest in a safe and orderly merchant marine service. *Id.* According to the court, the Coast Guard officer attempted to establish at the hearing what Alvarez, as the private litigant, would subsequently try to prove at trial: Lloyd's intoxication, his agressive role in the fight, and the prior conflicts between the men. *Id.*

60. *Id.* The court stated that "[i]t must be borne in mind that often we have here different ways of looking at the same claims or same type of claims as they are asserted in different titles." *Id.*, *quoting* Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943). *See* note 59 *supra*.

61. 580 F.2d at 1186. The facts involved in the Coast Guard hearing and the civil trial concerned the conduct of both Alvarez and Lloyd aboard the ship S.S. Export Commerce up to and including the date of the fight. *Id.* For an account of the Coast Guard hearing, *see* note 8 *supra*.

62. 580 F.2d at 1186. According to the court, the basic interests advanced by both the Coast Guard and Alvarez were determination of culpability and imposition of a penalty for the alleged condemned behavior. *Id.*

63. *Id.*

64. *Id.* at 1187. The "practical and expedient view" language is quoted from McCormick, who felt that progressive courts should recognize that

> neither identity of parties nor privity between parties is essential. These are merely means to an end. Consequently, if it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party.

Id., *quoting* C. MCCORMICK, *supra* note 13, § 256, at 620.

The court's summation of rule 804(b)(1) relied on McCormick's statement that "[u]nder these circumstances, the previous party having like motive to develop the testimony about the same material facts is, in the final analysis, a predecessor in interest to the present party." 580 F.2d at 1187.

The Third Circuit also disagreed with the district court's refusal to admit into evidence both a Coast Guard Decision and Order from the prior Coast Guard hearing and a prior convic-

In a concurring opinion, Judge Stern disagreed with the majority's analysis.[65] He stated that the rule's legislative history[66] indicated that the rule's "predecessor in interest" language required the finding of a privity relationship between the parties of the former and previous hearings.[67] Judge Stern concluded that such a relationship did not exist between the Coast Guard and Alvarez in the case at bar,[68] but would nevertheless have admitted Lloyd's testimony under rule 804(b)(5).[69]

Although the *Lloyd* court reviewed the legislative history in its analysis of the rule,[70] it is submitted that the court's treatment of the reasoning behind the language change that implemented the "predecessor in interest" terminology was superficial. By citing the Senate Committee's conclusion that there was little difference between the two versions,[71] the court purportedly justified the utilization of a community of interest analysis allowing for a broad interpretation of the rule.[72] By noting that "the difference between the two versions is not great,"[73] however, it is submitted that the Senate Committee did not imply that the two versions were coextensive. It is thus suggested that the court resurrected what Congress explicitly rejected[74] in defining "predecessor in interest" in terms of "community of interest."[75] It should be noted, however, that some support exists for the Third Circuit's interpretation of the rule.[76] Professors Wigmore and McCormick advocate a former testimony rule relaxing the strict common law requirement of privity.[77]

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tion in a Japanese criminal proceeding against Alvarez. *Id.* at 1183, 1190. The court refused to review other issues raised—the possible inconsistency between the finding of negligence and the finding of no breach of warranty of seaworthiness, the question whether a judgement n.o.v. should have been entered on the unseaworthiness claim, and the issue of maintenance and cure—because it ordered a new trial as to all the issues presented in the Alvarez counterclaim. *Id.* at 1190.

65. *Id.* at 1190-92 (Stern, J., concurring).

66. *Id.* at 1190 (Stern, J., concurring). *See* note 27 and accompanying text *supra*.

67. 580 F.2d at 1191 (Stern, J., concurring).

68. *Id.* (Stern, J., concurring). *See* note 22 *supra*.

69. 580 F.2d at 1192 (Stern, J., concurring). For contents of the rule, *see* note 19 *supra*.

70. 580 F.2d at 1185.

71. *Id. See* notes 29, 51 & 54 and accompanying text *supra*.

72. 580 F.2d at 1187. The court noted initially that Congress did not define "predecessor in interest." *Id.* at 1185. *See* note 51 and accompanying text *supra*. It therefore did not feel constrained by statutory limitations to conceptualize the interest embraced by the specific language of the rule. 580 F.2d at 1186.

73. 580 F.2d at 1185. *See* note 27 *supra*.

74. WEINSTEIN & BERGER, *supra* note 17, ¶ 804(b)(1) [04], at 804-65.

75. For a discussion of the court's analysis of the parties' community of interest, *see* notes 58-62 and accompanying text *supra*.

76. *See* C.MCCORMICK, *supra* note 13, § 256, at 619-20; J. WIGMORE, *supra* note 15, § 1388, at 111. For a summary of McCormick's view, *see* note 64 *supra*. For a summary of Wigmore's view, *see* note 77 *infra*.

77. Wigmore stated that the reason for requiring privity between the parties

> is that . . . the interest to sift the testimony thoroughly was the same for the other person as for the present person. The principle, then, is that where the interest of the person was calculated to induce equally as thorough a testing by cross-examination, then the present opponent has had adequate protection for the same end. Thus, the requirement

The pertinent question, however, in determining the propriety of the *Lloyd* decision is whether Congress employed the "predecessor in interest" language in its substantive law sense or in its evidentiary sense.[78] While the majority of writers commenting on the "predecessor in interest" terminology have considered it to be limited to its substantive sense, the *Lloyd* court disagreed.[79] This result was caused in part by the dearth of case law interpreting the rule, which rendered the *Lloyd* court particularly amenable to an analysis of the equities of the case before it. It is submitted that such equities clearly influenced the court's decision to interpret the rule as it did.[80] The court's equitable rather than strictly legal analysis of the hearsay exception focused on a trial court's general mandate to ascertain the truth.[81] Consistent with that purpose was the concept that rule 804(b)(1) is a rule of preference,[82] permitting qualified evidence to be admitted where it might otherwise be excluded.

The finding of similarity between the public interests represented by the Coast Guard and the private interests of a litigant in a civil trial[83] satisfied the *Lloyd* court that the Coast Guard had protected Alvarez' present interests in examining Lloyd.[84] By interpreting "predecessor in interest" solely in terms of an identity of issues analysis, however, it is submitted that the court ignored the common law safeguard of identity of parties.[85] Indeed, it was this very identity of parties requirement that distinguished the congressional rule from the draft submitted by the Supreme Court.[86]

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of identity of parties is after all only an incident or corollary of the requirement as to identity of issue.

J. WIGMORE, *supra* note 15, § 1388, at 111. Wigmore concluded that similar motive and interest between parties suffices without privity between the parties. *Id.* For a summary of McCormick's position, which is similar to that of Wigmore, *see* note 64 *supra*.

78. For Weinstein's view as quoted by the court, *see* note 45 *supra*.

79. WEINSTEIN & BERGER, *supra* note 17, ¶ 804(b)(1) [04], at 804-65; 11 MOORE'S FEDERAL PRACTICE ¶ 804.04[2], at VIII-265 (2d ed. 1975). Although Wigmore and McCormick favored a rule without a privity or an identity of parties requirement, such proposals were not made as interpretations of the accepted federal rule and therefore do not aid in deciding whether privity is necessary under rule 804(b)(1).

80. The court knew that a contradictory story of the incident existed. 580 F.2d at 1183. This story had been outlined by Lloyd under oath at a government proceeding at which cross-examination was allowed. *Id.* at 1182. Two of the three common law requirements, that the witness testify under oath subject to cross-examination, therefore remained protected because of the procedure followed at the Coast Guard hearing. For a discussion of the common law requirements of the hearsay rule, *see* notes 13-16 and accompanying text *supra*.

81. 580 F.2d at 1186.

82. *See* notes 20 & 56 and accompanying text *supra*.

83. 580 F.2d at 1186. *See* notes 58-60 and accompanying text *supra*.

84. 580 F.2d at 1186. *See* notes 58 & 59 *supra*.

85. Congress, by rejecting the Supreme Court draft, reinstated the common law rule of identity of parties with respect to those against whom former testimony may be introduced. *See* MOORE, *supra* note 79, ¶ 804.04[2], at VIII-265.

86. *Id.* By emphasizing identity of interests and equating public and private interests, the Third Circuit's analysis in *Lloyd* resembles the analysis propounded in *In re Master Key Litigation*, which has already been limited to its facts by one court. *See* notes 32-46 and accompanying text *supra*.

It is thus submitted that the Third Circuit's interpretation of rule 804(b)(1) contradicts congressional intent. The court failed to adequately distinguish the legislative history since the difference between the two versions of the rule, no matter how minimal,[87] must be explained. Congress rejected the Supreme Court draft because it considered it unfair to burden one party with the manner in which a witness was handled by a former party.[88] Moreover, by adding the "predecessor in interest" language to the initial draft, Congress narrowed the rule as submitted by the Supreme Court.[89] The *Lloyd* court nevertheless interpreted rule 804(b)(1) pursuant to the Supreme Court's proposed version.

In so doing, the Third Circuit has set a precedent for expansive use of former testimony. Other circuits may choose not to adopt the *Lloyd* test[90] and may formulate a privity requirement for rule 804(b)(1) similar to that of the *Peripheral EDP Devices* court.[91]

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87. In ascertaining the legislative intent from the language of the rule, "words used therein are to be given their ordinary meaning unless the context shows that they are differently used." Magnano Co. v. Hamilton, 292 U.S. 40, 46-47 (1934) (interpretation of state taxing statute). It is therefore submitted that the court should not ignore the additional words "predecessor in interest" appended to the Supreme Court draft by Congress. *See id.*

88. *See* note 27 *supra*.

89. 2 B. JONES, JONES ON EVIDENCE 9:22 (6th ed. Supp. 1978); WEINSTEIN & BERGER, *supra* note 17, ¶ 804(b)(1)[04], at 804-65.

90. *See* notes 58-60 and accompanying text *supra*.

91. *See* notes 37-46 and accompanying text *supra*.

FEDERAL PRACTICE AND PROCEDURE—IMPLIED CAUSE OF ACTION—VIOLATION OF CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY BY GAS SUPPLY COMPANY DOES NOT GIVE RISE TO AN IMPLIED PRIVATE CAUSE OF ACTION UNDER THE NATURAL GAS ACT.

Clark v. Gulf Oil Corp. (1977)

Gulf Oil Corporation (Gulf) and Texas Eastern Transmission Company (Texas Eastern) entered into a contract[1] in which Gulf warranted to deliver minimum amounts of natural gas to Texas Eastern,[2] a pipeline company, for ultimate distribution in the Philadelphia area.[3] Pursuant to section 7(c) of the Natural Gas Act (Act),[4] the Federal Power Commission (FPC) approved the agreement and issued a certificate of public convenience and necessity.[5] Subsequently Gulf began to make regular underdeliveries of gas in violation of section 7(b) of the Act.[6] Following an administrative hearing in which the FPC ordered Gulf to comply prospectively with its contractual obligations,[7]

1. Gulf Oil Corp. v. FPC, 563 F.2d 588, 612-14 (3d Cir. 1977).

2. *Id.* at 589. Upon examination of the contract, the Third Circuit found that Gulf was obligated to deliver a daily minimum of 625,000 Mcf (thousand cubic feet) of natural gas upon Texas Eastern's request. *Id.* at 595.

3. 570 F.2d 1138, 1140-41 (3d Cir. 1977), *cert. denied*, 435 U.S. 970 (1978). Texas Eastern, which supplied gas to local utilities, was one of two pipeline companies which delivered 97 percent of the natural gas used in Pennsylvania. 570 F.2d at 1141.

4. 15 U.S.C. § 717f(c) (1976). Section 7 provides in pertinent part: "No natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations; . . ." *Id.*

5. 570 F.2d at 1141.

6. *See* 563 F.2d at 593. Section 7(b) of the Act requires:

> (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such an abandonment.

15 U.S.C. § 717f(b) (1976). After it began deliveries of natural gas, Gulf discovered that it had vastly overestimated reserves in wells designated for delivery to Texas Eastern. 563 F.2d at 593. Gulf petitioned the FPC for an increase in rates, but the Commission denied their request in two opinions. *See* F.P.C. Op. No. 692, UTIL. L. REP. FED. (CCH) ¶ 11,528 (Apr. 19, 1974); F.P.C. Op. No. 692-A, UTIL. L. REP. FED. (CCH) ¶ 11,570 (Aug. 30, 1974). As a result, Gulf failed to meet its obligations intermittently in 1971, and continued to make underdeliveries on a regular basis. 570 F.2d at 1144-45.

7. F.P.C. Op. No. 780, UTIL. L. REP. FED. (CCH) ¶ 869 (Oct. 15, 1976), *aff'd*, F.P.C. Op. No. 780-A. UTIL. L. REP. FED. (CCH) ¶ 11,882 (Dec. 9, 1976). Gulf appealed the FPC's findings to the United States Court of Appeals for the Third Circuit, where the order was upheld. Gulf Oil Corp. v. FPC, 563 F.2d 588 (3d Cir. 1977).

In addition to the order compelling prospective compliance, the FPC also ordered Gulf to make refunds to Texas Eastern for ultimate distribution to consumers. 570 F.2d at 1142. Rather than requiring Gulf to refund to consumers their actual cost of covering the gas shortages, the agency limited the refunds to the difference in cost between Texas Eastern's requests for gas and Gulf's actual deliveries, multiplied by the difference between the contract price and the applicable market price for that area. *Id.* Futhermore, the FPC created a recoupment schedule under which Gulf could recover all refunds paid to consumers for its underdeliveries. *Id.* After Gulf had delivered a quantity of gas equal to the contract amount, less the portion for which it

several consumers instituted two class actions against Gulf in the United States District Court for the Eastern District of Pennsylvania seeking damages,[8] equitable relief, and costs resulting from Gulf's failure to deliver the specified amounts of gas.[9] The district court dismissed most of the plaintiffs' claims[10] but certified an interlocutory appeal on the issue of whether a private cause of action could be implied under the provisions of the Act.[11] The United States Court of Appeals for the Third Circuit[12] affirmed the district court's decision,[13] *holding* that the Natural Gas Act does not impliedly permit a private cause of action for a gas supply company's failure to comply

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had paid refunds, Gulf could petition the FPC for a rate change equal to the contract price plus the value of all refunds paid. *Id.* n.3.

8. 570 F.2d at 1140. Two class actions were filed against Gulf. The Clark plaintiffs sought to represent consumers whose natural gas was supplied by Philadelphia Gas Works (PGW). *Id.* The Thompson plaintiffs alleged that they represented consumers of gas supplied by Philadelphia Electric Company. *Id.* The plaintiffs requested class certification under rule 23 of the Federal Rules of Civil Procedure, FED. R. CIV. P. 23, asserting that they adequately represented the interests of Philadelphia gas users. 570 F.2d at 1140. In granting the class certifications, the United States District Court for the Eastern District of Pennsylvania consolidated the two actions. *Id.* In addition, PGW intervened as plaintiff to assert a claim arising out of the same defaults in Gulf's natural gas deliveries. *Id.*

9. 570 F.2d at 1140. The complaints alleged that the refunds allowed by the FPC, whether based upon area or national rates, did not fully compensate their expenditures occasioned by Gulf's failure to make full deliveries. *Id.* at 1142.

In addition, the plaintiffs filed complaints against Texas Eastern and Philadelphia Electric Co. (PECO) for damages arising out of the same shortage in deliveries. *Id.* at 1141. The district court dismissed the claim against PECO for lack of complete diversity of citizenship, required under § 1332 of the Judicial Code, 28 U.S.C. § 1332 (1976). 570 F.2d at 1141. The district court reserved judgment on the antitrust claim against Texas Eastern pending resolution of a possible cause of action implied under the Natural Gas Act. Clark v. Gulf Oil Corp., Nos. 76-2106 and 76-2711, slip op. at 17 (E.D. Pa. Mar. 28, 1977) (memorandum and order granting motions to dismiss).

10. Clark v. Gulf Oil Corp., Nos. 76-2106 and 76-2711, slip op. at 7-18 (E.D. Pa. Mar. 28, 1977). *See* 570 F.2d at 1141.

11. 570 F.2d at 1141. The district court granted certification under § 1292(b) of the Judicial Code, 28 U.S.C. § 1292(b) (1976), allowing the plaintiffs to take an interlocutory appeal limited to this issue in the United States Court of Appeals for the Third Circuit. 570 F.2d at 1141.

12. The case was heard before Chief Judge Seitz and Judges Aldisert and Rosenn. Judge Rosenn delivered the opinion of the court.

13. 570 F.2d at 1150. Before disposing of the case on the merits, the Third Circuit held that the district court properly exercised subject matter jurisdiction over the class action. *Id.* at 1142-44. Gulf contended that the district court did not have subject matter jurisdiction, citing several cases which held that, absent diversity, federal courts should not exercise jurisdiction over traditional state law claims because the activity is regulated by a federal agency. *Id.* at 1142-44. *See, e.g.*, Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961); Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950); Saturn Oil & Gas Co. v. Northern Natural Gas Co., 359 F.2d 297 (8th Cir. 1966).

The Third Circuit distinguished the principal case because the plaintiffs were relying directly upon a breach of federal law as the basis of their claim for relief. 570 F.2d at 1143. This matter was held to be a federal question arising under the laws of the United States, thus falling within the court's federal question jurisdiction. *Id.* at 1144. *See* 28 U.S.C. § 1331 (1976). The court cited Bell v. Hood, 327 U.S. 678 (1946), for the proposition that a claim for relief under a federal statute falls under federal subject matter jurisdiction where that claim is not wholly insubstantial or frivolous, is not made solely for the purpose of obtaining federal jurisdiction, and does not appear to be immaterial under the statute. 570 F.2d at 1143, *citing* Bell v. Hood, 327 U.S. 678, 681-82 (1946). *See also* Note, *Federal Jurisdiction in Suits for Damages Under Statutes Not Affording Such Remedies*, 48 COLUM. L. REV. 1090 (1948).

with a certificate of public convenience and necessity. *Clark v. Gulf Oil Corp.*, 570 F.2d 1138 (3d Cir. 1977), *cert. denied*, 435 U.S. 970 (1978).

The interstate transportation and sale of natural gas was first brought under federal regulation in 1937 when Congress enacted the Natural Gas Act.[14] Prior to that time, purchasers of natural gas, such as distribution companies, municipalities, and ultimately consumers, were forced to pay rates which were determined solely according to the discretion of the gas supply companies[15] since the industry, which operated primarily on an interstate basis, had effectively avoided state regulation.[16] By enacting a scheme of nationwide federal regulation, it was the express intention of Congress "that natural gas . . . [should] be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest."[17]

To accomplish this objective, Congress conferred jurisdiction upon the FPC over the interstate transportation and sale of natural gas[18] and imposed strict limitations upon the commercial activity of gas suppliers.[19] To enforce these regulations, the FPC was granted the authority to conduct investigations,[20] to hold hearings to determine the reasonableness and adequacy of service,[21] to issue orders to carry out its findings,[22] and to impose sanctions upon suppliers who fail to comply with the Act or any orders issued by the

14. 15 U.S.C. §§ 717-717w (1976).

15. *See* 81 CONG. REC. 6723 (1937).

16. *See* H.R. REP. NO. 709, 75th Cong., 1st Sess. 1 (1937). While states have full power to regulate sales within their borders, the United States Supreme Court has declared that they cannot interfere with interstate transactions in natural gas. Missouri v. Kansas Gas Co., 265 U.S. 298 (1924).

In its report, the Committee on Interstate and Foreign Commerce stated: "The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act." H.R. REP. NO. 709, 75th Cong., 1st Sess. 1, 2 (1937). *See also* 83 CONG. REC. APP. 2422 (1938), where Senator Wheeler observed: "[T]he natural gas business has developed from a local to a national industry, requiring Federal regulation complementary to State regulation in order to adequately protect the consuming public." *Id.*

17. Natural Gas Act, ch. 556, § 7(c), 52 Stat. 825 (1938). This provision was deleted when § 7(c) was amended by the Act of Feb. 7, 1942, Pub. L. No. 444, § 7, 56 Stat. 83 (current version at 15 U.S.C. § 717f(c) (1976)). For the Third Circuit's interpretation of the legislative purpose of the Act, *see* notes 56-60 and accompanying text *infra*.

18. *See* H.R. REP. NO. 709. 75th Cong., 1st Sess. 1 (1937).

19. *See* 15 U.S.C. §§ 717-717w (1976). Specifically, the Act restricts natural gas companies by declaring that unjust or unreasonable charges are to be unlawful, *id.* § 717c(a), that no company can extend undue preference or disadvantage to any individual, *id.* § 717c(b)(1), and that all suppliers must maintain a schedule of rates and charges open for public inspection. *Id.* § 717c(c).

20. *Id.* § 717m(a).

21. *Id.* § 717m(b).

22. Section 5(a) of the Act provides in pertinent part:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint . . . shall find that any rate charge or classification . . . or that any rule, regulation, practice, or contract . . . is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: . . .

15 U.S.C. § 717d(a) (1976).

FPC.[23] Furthermore, the Act authorized the FPC to seek judicial enforcement of its orders[24] and provided criminal sanctions for a breach of its provisions,[25] but did not afford private, civil relief for such violations.

The United States Supreme Court has found implied private rights of action, however, under numerous federal statutes which do not expressly provide for such relief.[26] The first case in which the Supreme Court allowed an implied private action was *Texas & Pacific Railway Co. v. Rigsby*,[27] in which a railroad was held liable for injuries resulting from a violation of the Federal Safety Appliances Act.[28] In deciding that the injured party was entitled to recover for a violation of the federal statute, the Court stated that "[a] disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied according to a doctrine of the common law."[29]

The Supreme Court subsequently refused to imply a private cause of action, however, in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*,[30] where it found that a claim asserted for the statutory right to "reasonable rates" for fuel supplies[31] fell within the exclusive jurisdiction of the FPC.[32] The Court therefore concluded that it had no power to create

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23. *Id.* § 717o.

24. *Id.* § 717s(a).

25. *Id.* § 717t.

26. *See* Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963). For a compilation of the Supreme Court cases allowing such relief, *see* note 34 *infra*.

27. 241 U.S. 33 (1916).

28. *Id.* at 39. *See* Federal Safety Appliance Act, 45 U.S.C. § 4 (1970). The Federal Safety Appliance Act, however, is no longer considered to provide a basis for an implied cause of action. *See* Moore v. Chesapeake & Ohio Ry. Co., 291 U.S. 205 (1934); Jacobsen v. New York, N.H. & H.R.R., 206 F.2d 153 (1st Cir. 1953), *aff'd per curiam*, 347 U.S. 909 (1954).

29. 241 U.S. at 39. The Court was referring to the common law doctrine that, for every right created by statute, courts must provide a remedy to give effect to that right. *Id. See also* Couch v. Steel, 118 Eng. Rep. 1193 (Q.B. 1854). For a more modern application of this doctrine, *see* J.I. Case Co. v. Borak, 377 U.S. 426 (1964), where the Court stated that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *Id.* at 433. For a more detailed discussion of *Borak*, *see* note 35 and accompanying text *infra*.

30. 341 U.S. 246 (1951).

31. *Id.* at 250. The plaintiff's claim was grounded upon the Federal Power Act, 16 U.S.C. §§ 791a-828c (1976). Section 205 of the Federal Power Act, 16 U.S.C. § 824(a) (1976), mandates that all rates charged be just and reasonable. *Id. See* 341 U.S. at 250. The Natural Gas Act contains a similar provision at § 4(a). *See* 15 U.S.C. § 717c(a); note 19 and accompanying text *supra*.

32. 341 U.S. at 251-52. The determination of "reasonable rates" is a matter of administrative discretion and falls within the particular agency's "primary jurisdiction." *See* United States v. Western Pac. R.R. Co., 352 U.S. 59 (1956). Under the doctrine of primary jurisdiction, a court cannot resolve a dispute within its jurisdiction which involves an issue that is within the control of an administrative body and requires the exercise of special knowledge or skill held by that agency. 352 U.S. at 63-64. Before a court can take action on that issue, the agency must have rendered a final decision or the plaintiff must have exhausted all administrative remedies. *See* Annot., 1 L. ED. 2d 1596 (1956); Annot., 94 L. ED. 806 (1949); O'Neil, *Public Regulation and Private Rights of Action*, 52 CALIF. L. REV. 231 (1964).

an independent judicial remedy in the absence of an agency determination.[33]

Thereafter, the Supreme Court extended the implied private action doctrine to violations of other statutory provisions,[34] but limited its application to those cases where a private cause of action was necessary in order to effectuate the statute's legislative purpose.[35] In each case the Court determined whether a private remedy was required by construing the statute's legislative purpose,[36] and denied those claims where Congress could not have "intended" to afford such protection to the private individual.[37]

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33. 341 U.S. at 251-52. Regarding the individual's right to reasonable rates under the Federal Power Act, the Court stated that

> the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.

Id.

34. *See, e.g.*, Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971) (§ 10(b), Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976)); Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) (fourth amendment, U.S. CONST. amend. IV); Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (§ 5, Voting Rights Act of 1965, 42 U.S.C. § 1973c (1976)); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967) (§ 15 of the Rivers and Harbours Act of 1899, 33 U.S.C. § 409 (1976)); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) (§ 301(a), National Labor Relations Act, 29 U.S.C. § 185(a) (1976)); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944) (Railway Labor Act, 45 U.S.C. §§ 151-88 (1970)).

35. *See* J.I. Case Co. v. Borak, 377 U.S. 426 (1964). In *Borak* the Court allowed a private remedy for a fraudulent proxy solicitation in violation of § 14(a) of the Securites Exchange Act of 1934, 15 U.S.C. § 78n(a) (1976). 377 U.S. at 433. In so doing, the Court explicitly granted private relief only as a "necessary supplement" to the express provisions of the statute required to carry out its underlying legislative purpose. *Id.* at 432. The Court implied the congressional intent to create this remedy because it was the only effective way to enforce the provisions of the statute. *Id.*

While this case involved a clear need for judicial relief, the *Borak* decision failed to announce explicit standards for the the implication of private remedies under statutes. While courts invoked the "necessary supplement" test in deciding whether to imply private remedies, this analysis became difficult to apply. *See* Comment, *Private Rights From Federal Statutes: Toward a Rational Use of Borak*, 63 NW. U.L. REV. 454 (1968). This problem led to the Court's declaration of more explicit standards in Cort v. Ash, 422 U.S. 66 (1975). *See* notes 38-42 and accompanying text *infra*.

36. *See, e.g.*, National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974); Bivens v. Six Unknown Agents, 403 U.S. 388 (1971); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967). In *Wyandotte*, the Court granted civil relief to the federal government under § 15 of the Rivers and Harbours Act of 1899, 33 U.S.C. § 409 (1976), although the statute did not expressly provide for such a remedy. 389 U.S. at 197-98. The Government sought relief for the removal of a submerged ship from a navigable waterway when the defendant's failure to do so was in direct violation of the provisions of that statute. *Id.* at 197. The Court reasoned that such relief was necessary to effecutate the statutory purpose of keeping the water course free from dangerous obstructions. *Id.* at 201, 204. Since the relief provided by the state was inadequate to compensate the Government for this necessary expense, a private remedy was implied. *Id.* at 202-06.

37. *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974), in which the United States Supreme Court declined to imply a private cause of action for the enforcement of the Rail Passenger Service Act of 1970 (Amtrak Act), 45 U.S.C. §§ 501-65 (1970). 414 U.S. at 464-65. The action was brought by an organization of rail commuters which sought to enjoin the discontinuance of certain unprofitable train routes. *Id.* at 454. The Court determined the congressional intent to deny a private remedy by examining the legislative history and by deciding whether an implied cause of action would be consistent with the purposes of the Amtrak Act. *Id.* at 457-65. The Court found that Congress had expressly re-

Recently, however, the Supreme Court has refined its analysis by formulating a four-part test to determine whether private relief should be implied under a federal statute. In *Cort v. Ash*,[38] the Court held that a private cause of action for a violation of the Federal Election Campaign Act of 1971[39] could not be implied,[40] stating:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . .—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[41]

The Supreme Court thus clarified the earlier case law in *Cort* by providing federal courts with a set of standards for determining whether a federal statute creates a private right of action by implication.[42]

Prior to the *Clark* decision, only one federal circuit court had directly decided whether a private cause of action could be implied under a provision of the Natural Gas Act. In a pre-*Cort* decision, *Farmland Industries v. Kansas-Nebraska Natural Gas Co.*,[43] the United States Court of Appeals for the Eighth Circuit affirmed a district court decision[44] awarding private relief

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jected a private right of action when the statute was drafted. *Id.* at 458-61. Furthermore, the Court decided that a private right of action would contradict the legislative purpose of the statute. *Id.* at 461-65. Specifically, the Court held that a private right to dispute every proposed discontinuance would conflict with the purpose of § 404, 45 U.S.C. § 564 (1970 & Supp. V 1975), which allows Amtrak to eliminate uneconomic routes without prior federal regulatory approval. 414 U.S. at 461-62. To allow private injunction of Amtrak's authority to discontinue routes would subject Amtrak to multiple, and possibly inconsistent, lawsuits in every federal district in which it operated. *Id.* at 463-64. Congress thus could not have "intended" such private enforcement of the statute, and no cause of action could be implied. *Id.* at 464.

38. 422 U.S. 66 (1975).

39. 18 U.S.C. §§ 591-607 (1976). The defendant had acted in violation of § 610, which prohibited campaign contributions from corporations in federal elections. 18 U.S.C. § 610 (1970)(repealed 1970).

40. 422 U.S. at 85. In so ruling, the Supreme Court reversed a decision by the United States Court of Appeals for the Third Circuit, which had held that a private cause of action was an appropriate remedy. Ash v. Cort, 496 F.2d 416 (3d Cir. 1974), *noted in* the Third Circuit Review, 20 VILL. L. REV. 615 (1975).

41. 422 U.S. at 78, (emphasis by the Court) (citations omitted).

42. *See* Crawford & Schneider, *The Implied Cause of Action and the Federal Aviation Act: A Practical Application of* Cort v. Ash, 23 VILL. L. REV. 657, 658 (1978). In that article, however, the authors note that the criteria established by *Cort* have not led to certainty in the law, but have increased the degree of litigation in this area. *Id.* at 658-59.

43. 486 F.2d 315 (8th Cir. 1973).

44. *Id.* at 318. The United States District Court for the District of Nebraska conducted an exhaustive review of the decisions which had confronted the issue of whether a federal court should imply a private cause of action for the breach of a federal statute. *See* Farmland Indus.

for the termination of boiler gas service, without prior approval by the FPC, after expiration of a delivery contract.[45] Upon finding that the gas supplier had a continuing duty to deliver gas,[46] the Eighth Circuit concluded that the termination was a violation of a federal right for which there must be a concurrent federal remedy,[47] and thus held that the natural gas company was liable for the resulting harm.[48]

Rejecting the *Farmland* holding, the *Clark* court applied the four-part *Cort* test[49] and concluded that no cause of action could be implied under the Act.[50] Initially, the court determined that the plaintiffs were among the class to be protected by the Act because "the overall purpose of the Natural Gas Act is to protect the interests of consumers in an adequate supply of gas and at reasonable rates."[51] Under the second part of the *Cort* analysis, the court considered whether there was any indication of legislative intent to create or deny a private cause of action under the Act,[52] and rejected the plaintiffs' argument that the exclusive grant of jurisdiction in the federal courts for all actions arising under the Act was a sufficient indication of such intent.[53] The *Clark* court narrowly construed this jurisdictional provision,[54] stating that "[t]he grant of jurisdiction in the district courts need not be read

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v. Kansas-Nebraska Natural Gas Co., 349 F. Supp. 670, 677-81 (D. Neb. 1972), *aff'd*, 486 F.2d 315 (8th Cir. 1973). The district court concluded that it was appropriate to imply a private cause of action for a breach of a provision of the Act. 349 F. Supp. at 681.

45. 349 F. Supp. at 683. The district court awarded compensatory damages and declaratory relief for the abandonment of boiler gas service without prior Commision approval, in violation of § 7(b) of the Act, 15 U.S.C. § 717f(b) (1976). 349 F. Supp. at 683. *See* note 6 *supra*. The court declined to award damages and injunctive relief for allegedly unreasonable increased rates, however, holding that a federal court should not imply such a remedy when other relief was available. 349 F. Supp. at 681-82. *See* notes 87-94 & 96 and accompanying text *infra*.

46. 486 F.2d at 317.

47. *Id.* *See* note 29 *supra*.

48. 486 F.2d at 317.

49. *See* text accompanying note 41 *supra* for an enumeration of the *Cort* requirements for the implication of a cause of action from a federal statute.

50. 570 F.2d at 1145-50.

51. *Id.* at 1145-46.

52. *Id.* at 1146-48.

53. *Id.* at 1146. Section 22 of the Act states in pertinent part:

> The District Courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder.

15 U.S.C. § 717u (1976). The United States Supreme Court did grant a private remedy under a similar provision, § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1976), in J.I. Case Co. v. Borak, 377 U.S. 426 (1964). *See* note 35 *supra*. The Third Circuit noted that the Supreme Court has since refused to imply a cause of action under the same statute, even though it still contains the § 27 grant of jurisdiction. 570 F.2d at 1146. *See* Piper v. Chris-Craft Indust., 430 U.S. 1 (1977). A provision thus granting exclusive jurisdiction to federal courts for a breach of a statute was considered inconclusive evidence of legislative intent to create a private remedy. 570 F.2d at 1146.

54. 570 F.2d at 1146.

as extending beyond those causes of action expressly provided for elsewhere in the Act."[55]

Having failed to find an express legislative intent to grant or deny a private cause of action,[56] the court proceeded to analyze "the congressional scheme under the Natural Gas Act to determine whether a private cause of action was necessary to effectuate the policy and purpose of that scheme."[57] The court examined several provisions of the Act,[58] and observed that Congress vested broad regulatory powers in the FPC to maintain the operation of this industry and to ensure the availability of natural gas.[59] The *Clark* court concluded that a private cause of action for damages was not contemplated by Congress since it evidently intended "to create a comprehensive and effective regulatory scheme for the transportation and sale of natural gas in interstate commerce, built upon a carefully conceived and structured system for enforcement of the Act's provisions."[60]

The Third Circuit cited the decision of *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*[61] as a mandate by the United States Supreme Court that complex matters of relief for violations of fuel regulatory statutes should be decided by the administrative agencies which possess the special skill and resources to determine an appropriate remedy.[62] The court thus decided that an implied cause of action would not meet the third *Cort* criterion of consistency with the underlying purposes of the legislative scheme.[63] Furthermore, the court reasoned that since Congress had meticulously created a uniform system of regulation for the entire natural gas industry, any judicial intervention on the private level could disrupt and conceivably destroy this scheme.[64]

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55. *Id. See* § 20 of the Natural Gas Act, which authorizes the FPC to bring an action in federal court to enforce any provision of the Act, or any order which the Commission issues thereunder. 15 U.S.C. § 717s(a) (1976). *See* text accompanying note 24 *supra*.

56. 570 F.2d at 1146.

57. *Id.* at 1146-47. *See* notes 35-37 and accompanying text *supra*.

58. 570 F.2d at 1147-48. First, the court examined §§ 7(b), (c), and (e) of the Act, 15 U.S.C. §§ 717f(b), (c), (e) (1976), relied upon by the plaintiffs as supporting their implied cause of action, which Gulf allegedly violated by making reduced deliveries of gas. 570 F.2d at 1145. These provisions require natural gas companies to obtain Commission approval before abandoning any portion of their service, and to procure a certificate of public convenience and necessity before engaging in any new transactions in natural gas. *Id.* at 1147. The court proceeded to discuss §§ 4, 5, 8(b) and 8(c), 15 U.S.C. §§ 717c, d, g(b), g(c) (1976), which impose a duty on the Commission to provide the public with fair and reasonable rates, and grants the FPC the power to hold hearings to make this determination. 570 F.2d at 1147-48. Finally, the court noted that §§ 14, 16, and 20(a), 15 U.S.C. §§ 717m, o, s(a) (1976), grant the Commission broad administrative power to investigate alleged violations, to issue orders and discontinue them, and to seek judicial enforcement of its commands. 570 F.2d at 1147-48.

59. 570 F.2d at 1148.

60. *Id.*

61. 341 U.S. 246 (1951). For a discussion of *Montana-Dakota, see* notes 30-33 and accompanying text *supra*.

62. 570 F.2d at 1149.

63. *Id.*

64. *Id.* at 1149-50. At this point, Chief Judge Seitz, while concurring with the result of the case, departed from the opinion of the majority. He found that this particular view was not essential to the outcome of the case and was of questionable validity. *Id.* at 1150 n.12.

In arriving at this conclusion, the *Clark* court distinguished the contrary result reached by the Eighth Circuit in *Farmland*,[65] upon which the plaintiffs heavily relied.[66] The court noted that *Farmland*, which preceded the *Cort* decision, did not apply the principles established by the *Cort* quadripartite test.[67] Moreover, the *Farmland* decision was predicated upon a "permanent cessation" of gas deliveries,[68] while the instant case involved only a reduction in service.[69] The Third Circuit found these distinctions to be crucial, and thus determined that the *Farmland* analysis was inapplicable to the *Clark* facts.[70]

Finally, the Third Circuit emphasized that the relief sought by the plaintiffs was not in the traditional form of damages[71] since any award would have to be refunded to Gulf pursuant to a recoupment schedule devised by the FPC.[72] In addition, the court reasoned that the resetting of rates and the conduct of recoupment proceedings were most effectively left to the agency.[73] The *Clark* court therefore determined that "[u]nder these conditions, an implied cause of action for damages does not add significant additional protection for ultimate consumers of gas but might well disrupt the congressional scheme devised for the regulation of an essential industry and for the protection of the public generally."[74]

In deciding *Clark*, the Third Circuit correctly concluded that an implied cause of action would not advance the legislative purpose of the Natural Gas Act.[75] While, the Act is ultimately intended to protect consumers,[76] the

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65. For a discussion of *Farmland*, *see* notes 43-48 and accompanying text *supra*.

66. 570 F.2d at 1148-49.

67. *Id.* at 1148. As authority for this requirement, the Third Circuit relied upon its earlier decision in Polansky v. Trans World Airlines, 523 F.2d 332, 335 (3d Cir. 1975), where it had held that all private actions implied under a federal statute must be tested against the standards established by *Cort*. 570 F.2d at 1148.

68. 486 F.2d at 317.

69. 570 F.2d at 1148.

70. *Id.* at 1148-49. *See* notes 83-96 and accompanying text *infra*.

71. 570 F.2d at 1145, 1150.

72. *Id.* at 1145. *See* note 7 *supra*. The plaintiffs admitted the necessity of returning all refunds paid by Gulf, as shown by plaintiff-intervenor Philadelphia Gas Work's (PGW) claim for relief, which stated:

> What PGW seeks . . . is immediate monetary relief to cover fully the costs PGW incurred in securing replacement gas over and above the limited monetary relief afforded by the FPC. As with the monetary relief secured from the FPC, PGW concedes the necessity of restoring such amounts to Gulf based on the timetable set forth by the FPC in opinion No. 780.

570 F.2d at 1145, *quoting* Brief for Appellant Philadelphia Gas Works at 28, Clark v. Gulf Oil Corp., 570 F.2d 1138 (3d Cir. 1977), *cert. denied*, 435 U.S. 970 (1978).

73. 570 F.2d at 1150. This factor led the Third Circuit to conclude that the fourth element of the *Cort* analysis, the availability of alternative state remedies, was not relevant to the determination of the implied cause of action. *Id.* Plaintiff's requested relief was dependent upon the FPC's complex recoupment schedule. *See* note 7 *supra*. Since this is not an area "traditionally relegated" to state law, the court found that this consideration was not relevant to the *Clark* case. 570 F.2d at 1150.

74. 570 F.2d at 1150.

75. *See id.* at 1150.

76. *Id.* at 1145-46. The court looked to the United States Supreme Court for the proposition that the "primary aim" of the Act is "the protection of consumer interests against exploitation at

method chosen by Congress to achieve this end was "a comprehensive and effective regulatory scheme for the transportation and sale of natural gas."[77] The provisions of the Act thus allow for a uniform system of management of all gas suppliers.[78] The Act does not concern itself with the rights of consumers in the event of default by those suppliers, but rather vests broad administrative powers in the FPC to insure that these consumers are protected in such cases.[79] Since the "policy and purpose" of the Act is to erect this regulatory structure,[80] private enforcement by consumers would not be a "necessary supplement" to this legislative scheme.[81] Furthermore, the creation of a new private remedy under the Act would permit unwarranted judicial intervention into a domain expressly delegated to a federal agency, in contravention of the design of the governing statute.[82]

While the Third Circuit correctly applied the *Cort* principles to the instant case, it is submitted that the court failed to adequately distinguish the contrary precedent of *Farmland.*[83] The court summarily dismissed the outcome in *Farmland* since that case was decided prior to the promulgation of the quadripartite *Cort* test.[84] The *Clark* court failed to note, however, that the *Farmland* court affirmed a district court decision[85] which invoked all of the principles subsequently established by *Cort.*[86] By neglecting to recognize this correlation, the Third Circuit disregarded a well reasoned decision which invoked a private cause of action for a similar breach of the Natural Gas Act.

The *Clark* court relied upon *Montana-Dakota*[87] as more persuasive authority for denying relief in the instant case.[88] *Montana-Dakota* involved a

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the hands of the natural gas companies." *Id.* at 1146, *citing* FPC v. Hope Gas Co., 320 U.S. 591, 610 (1944).

77. 570 F.2d at 1148. *See* notes 56-64 and accompanying text *supra.*

78. For a discussion of pertinent regulatory provisions of the Act, *see* notes 18-25 and accompanying text *supra.*

79. 570 F.2d at 1148. *See* text accompanying note 60 *supra.*

80. 570 F.2d at 1147-49.

81. *Id.* at 1150. *See* notes 35-37 & 56-64 and accompanying text *supra.*

82. 570 F.2d at 1150. *See* note 64 and accompanying text *supra.*

83. *See* notes 65-70 and accompanying text *supra.*

84. 570 F.2d at 1148. *See* note 67 and accompanying text *supra.*

85. 349 F. Supp. 670 (D. Neb. 1972), *aff'd.*, 486 F.2d 315 (8th Cir. 1973).

86. 349 F. Supp. at 679. The United States District Court for the District of Nebraska applied the following criteria for implying a private remedy under the Natural Gas Act:

> Before a specific private remedy, either equitable or legal, may be found in a congressional Act not expressly granting one, it must appear that (1) the plaintiff is within a class intended to be protected by the Act, (2) private enforcement will further the congressional policy of the Act, (3) the duty breached was created by the Act rather than by state statutory or common law, (4) the violation of the duty affected the plaintiff directly, and (5) no other remedy is available to guard adequately the right asserted.

Id. For a comparison with the *Cort* test, *see* text accompanying note 41 *supra.* Although the *Farmland* decision preceded *Cort*, it applied many of the same considerations in deciding whether a cause of action can be implied under the Natural Gas Act. By summarily dismissing *Farmland* as superseded by *Cort*, the Third Circuit failed to answer many of the important questions raised by the outcome in that case.

87. For a discussion of *Montana-Dakota, see* notes 30-33 and accompanying text *supra.*

88. 570 F.2d at 1149.

claim for allegedly excessive rates,[89] in violation of the Federal Power Act,[90] which was denied by the Supreme Court because the controlling federal agency had not decided which rates were "reasonable" under the circumstances.[91] The Third Circuit found the claim asserted in *Clark* analogous since, in that case as well, the regulatory agency possessed the knowledge and flexibility to award effective relief.[92] The *Clark* court's reliance upon *Montana-Dakota* seems inapposite, however, because the plaintiffs there attempted to assert rights which could be determined solely by a regulatory agency, before the agency had rendered a decision,[93] while the *Clark* plaintiffs' claim was based on a violation of the certificate of public convenience and necessity issued by the FPC.[94] The relief sought in *Clark* was therefore analogous to the consequential damages awarded in *Farmland* as a result of the violation of a preexisting obligation owed to the plaintiffs.[95] In light of the correlation between the violations in *Clark* and *Farmland,* as distinguished from the claims asserted in *Montana-Dakota,*[96] it is submitted that the court should have offered stronger support for distinguishing *Farmland* on the basis of the type of relief which was granted.

In not allowing an implied cause of action, future application of the result in *Clark* may deny adequate relief to consumers injured by forthcoming defaults in fuel deliveries. After its hearings on Gulf's violations, the FPC acknowledged its inability to effectively compensate consumers,[97] and suggested that further relief be sought within the court system.[98] By refusing to grant judicial relief, however, the Third Circuit failed to act upon this deferral,[99] thus denying the plaintiffs complete recovery for Gulf's shortages. Absent reversal of agency action, therefore, this result will effectively limit

89. 341 U.S. at 250.

90. 16 U.S.C. §§ 791a-828c (1976). *See* note 31 *supra.*

91. 341 U.S. at 251. *See* notes 32 & 33 *supra.*

92. 570 F.2d at 1149. *See* text accompanying note 62 *supra.*

93. 341 U.S. at 251-52. *See* note 33 *supra.*

94. 570 F.2d at 1144-45. *See* notes 4 & 5 and accompanying text *supra.*

95. *Compare* the provisions of § 7(b) of the Act, 15 U.S.C. § 717f(b) (1976), quoted in note 6 *supra, with* those of § 7(c), 15 U.S.C. § 717f(c) (1976), enumerated in note 4 *supra.* The sections are parallel in that they forbid certain actions, committed by the defendants in *Farmland* and *Clark* respectively, without prior approval of the FPC.

96. The distinction between the two claims is clearly illustrated by the district court decision in *Farmland,* where the court denied a claim for allegedly unreasonable rates, holding that other adequate relief was available, while allowing damages for an abandonment of gas deliveries. 349 F. Supp. at 681-82. *See* note 45 *supra.*

97. F.P.C. Op. No. 780, UTIL. L. REP. FED. (CCH) ¶ 11,869 (Oct. 15, 1976). Specifically, the FPC refused to grant the relief request by the plaintiffs because "conditioning relief upon actual proof of the myraid effects of Gulf's non-delivery could lead to endless proceedings." *Id.*

98. 570 F.2d at 1142. *See* F.P.C. Op. No. 780-A, UTIL. L. REP. FED. (CCH) ¶ 11,882 (Dec. 9, 1976). In that opinion the FPC stated:

> The formula may or may not cover all the effects of Gulf's non-delivery, and the Commission's decision to order the payment of refunds does not prevent PGW or other customers and distributing companies served through Texas Eastern's system from seeking additional relief in whatever forum they choose if they find that relief inadequate.

Id. In response, however, the Third Circuit found that that regulatory body was better qualified to apportion adequate relief. 570 F.2d at 1149.

99. 570 F.2d at 1149. *See* notes 71-74 and accompanying text *supra.*

consumers' ability to recover to the award granted by the regulatory agency, regardless of whether that award corresponds to the consumers' actual damages.

While the court's decision in *Clark* may thus preclude full judicial relief to consumers aggrieved by fuel shortages, the *Clark* opinion can be viewed as a strong policy statement concerning separation of powers. The court did not reach the question of the adequacy of the agency's award, but rather decided the case on the issue of whether the judiciary or an administrative agency should enforce a federal regulatory statute.[100] By refusing to grant complete compensation under the statute, the decision can be read as declaring a strong precedent against judicial interference in an area regulated by a federal agency.

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100. *See* 570 F.2d at 1147-50; notes 61-64 and accompanying text *supra*.